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**May 05 2025**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Thomas W. McGee, III, Circuit Court Judge

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Appellate Case No. 2024-002074

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Portundo M. Kimble, as Personal Representative  
of the Estate of Devon Enrique Kimble, Deceased

v.

Jays Bar and Grill, LLC

---

**RECORD ON APPEAL**

---

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND ) CIVIL ACTION NUMBER: 2023-CP-40-03052

Portundo M. Kimble, as Personal )  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )

Plaintiff, )

vs. )

Jays Bar and Grill, LLC, )

Defendant. )

**ORDER FOR PUBLICATION**

Having read and filed the Petition for Service of Publication by Bland Richter, LLP, attorney for the plaintiff, and it appearing that the Registered Agent for Defendant Jays Bar and Grill, LLC cannot, after due diligence, be located in Richland County, South Carolina nor Horry County South Carolina (address listed with Secretary of State), and it further appearing that a cause of action exists against said defendant,

NOW, THEREFORE, upon motion of Bland Richter, LLP;

IT IS ORDERED that service in this matter be made on defendant Jays Bar and Grill, LLC by publishing a copy of the Summons and Complaint in the Columbia Free Times, which this court feels to be the newspaper most likely to give notice to said defendant, with said Summons and Notice of filing of Complaint to be published once weekly for three (3) consecutive weeks.

**(SIGNATURE PAGE OF CLERK OF COURT ON FOLLOWING PAGE)**



Richland Common Pleas

**Case Caption:** Portundo M Kimble , plaintiff, et al vs Jays Bar And Grill Llc

**Case Number:** 2023CP4003052

**Type:** Order/Publication

So Ordered

s/Jeanette W. McBride by Brandy Metts

Electronically signed on 2023-08-01 08:24:21 page 2 of 2

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND ) CIVIL ACTION NUMBER: 2023-CP-40-03052

Portoundo M. Kimble, as Personal )  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )

Plaintiff, )

vs. )

Jays Bar and Grill, LLC, )

Defendant. )

**ORDER DENYING RELIEF  
FROM ENTRY OF DEFAULT**

This matter comes before me on Defendant’s Motion to Set Aside Default. Present at the hearing were Ronald L. Richter, Jr., counsel for the Plaintiff, and Ryan Holt, counsel for the Defendant. After reviewing the record and hearing the arguments of counsel, **I HEREBY FIND and ORDER** as follows:

1. This action was commenced by the filing of a Summons & Complaint on June 12, 2023.
2. After filing the Summons and Complaint, the Plaintiff engaged in diligent efforts to perfect service of process:

- a. According to the Affidavit of Diligent Search by process server, Jeff Costner, filed on July 31, 2023, seven (7) separate attempts were made to serve Jay Kalin, the registered agent for service for Jays Bar and Grill, LLC, at the Defendant’s principal place of business. All attempts were unsuccessful. The Affidavit is suggestive that Mr. Kalin was evading service.
- b. According to the Affidavit of Non-Service by process server, Roger Turner, filed on July 31, 2023, an attempt was made to serve Jay Kalin as registered agent for Jays Bar and Grill, LLC, at the address of record provided to the South Carolina

Secretary of State's Office. However, when the attempt was made to perfect service, Turner was told by the occupant of the residence that the occupant was a tenant and that the whereabouts of Mr. Kalin were unknown.

3. Following diligent efforts to perfect service of process, the Plaintiff applied for and obtained an Order of Publication on August 1, 2023.
4. The Plaintiff thereafter published notice of this action in the Free Times, a newspaper of general circulation in Richland County, which is the principal place of business of the Defendant.
5. While the Defendant contends that the Free Times was not a proper outlet for publication because the registered agent for the Defendant, Jay Kalin, is allegedly a resident of Horry County, I find that publication in a newspaper of general circulation in Richland County, the Defendant's principal place of business, was proper.
6. On August 31, 2023, the Plaintiff filed an Affidavit of Publication.
7. On October 5, 2023, the Plaintiff filed an Affidavit of Default and a Notice of Motion and Motion for Default.
8. Entry of Default was made on October 6, 2023.
9. I find no defect in the application for Entry of Default and/or in the Entry of Default itself.
10. Counsel for the Defendant noticed his appearance on March 7, 2023, and the Defendant filed a Motion to Set Aside Default on March 22, 2023.
11. The standard for granting relief from an entry of default is "good cause" as prescribed by the South Carolina Rules of Civil Procedure. [Rule 55\(c\), SCRPC](#) ("For good cause shown the court may set aside an entry of default . . . ."); see [Wham v. Shearson Lehman Bros.](#),

Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) (explaining the standard for granting relief under Rule 55(c) is "good cause"). "This standard requires a party seeking relief from an entry of default . . . to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

12. "Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888 (citing Wham, 298 S.C. at 465, 381 S.E.2d at 501-02). A trial court is not required to make specific findings of fact for each factor if there is sufficient evidence in the record to support the trial court's decision. Sundown, 383 S.C. at 608, 681 S.E.2d at 888. The decision whether to set aside an entry of default is within the sound discretion of the trial court. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).
13. I find that in the present case the Defendant has not articulated any cause, much less good cause, for having failed to answer the Summons and Complaint in a timely manner.
14. While the Defendant points to alleged procedural defects in the process, all of which I find unavailing, there is no explanation advanced as to why the Defendant defaulted, nor is there an explanation of how and why he ultimately filed his Motion to Set Aside Default, nearly ten (10) months after the filing of the Summons and Complaint and nearly six (6) months after the Entry of Default.
15. Having failed to demonstrate any cause, much less good cause, for the default, it is not necessary for the Court to examine the Wham factors. Nevertheless, I further find that

were I to consider the Wham factors, the Defendant's request for relief fails also based on the timing of the motion for relief and the continuing prejudice of the plaintiff whose suffering after the loss of his son is only exacerbated by the inability to achieve closure of the judicial process.

Based on the foregoing, I HEREBY FIND AND ORDER that the Defendant's Motion to Set Aside Default is DENIED. The Plaintiff shall coordinate with the Chief Administrative Judge ten (10) days after the entry of this Order to set a future date for a damages hearing.

IT IS SO ORDERED!

---

The Honorable Daniel Coble  
Circuit Court Judge

Columbia, South Carolina

August \_\_\_\_, 2024



Richland Common Pleas

**Case Caption:** Portundo M Kimble , plaintiff, et al vs Jays Bar And Grill Llc

**Case Number:** 2023CP4003052

**Type:** Order/Other

So Ordered

s/ Daniel Coble, 2774

Electronically signed on 2024-08-20 09:30:00 page 5 of 5

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
Portundo M. Kimble, as Personal )  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Jays Bar and Grill, LLC, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2023-CP-40-03052

**ORDER DENYING DEFENDANT’S  
MOTION FOR RECONSIDERATION  
PURSUANT TO RULE 59(e), SCRPC**

This matter is before the Court upon Jays Bar and Grill, LLC’s Motion for Reconsideration Pursuant to Rule 59(e), SCRPC (“the Motion”). The Motion asks this Court to alter, amend, or reconsider its Order entered August 20, 2024 denying the Defendant’s Motion to Set Aside Default, dated March 22, 2024, and heard via Webex on August 5, 2024.

After reviewing the applicable law and considering the arguments raised in the Motion, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Court concludes that altering, amending, or reconsidering its prior Order is unwarranted, and the issues raised in the Motion do not change the Court’s reasoning or conclusions. As such, Defendant’s Motion for Reconsideration is hereby **DENIED**, and the Court, pursuant to the discretion afforded by Rule 59 and *Pollard v. County of Florence*, concludes that a hearing is not necessary to rule on Defendant’s Motion for Reconsideration. *See* Rule 59(f), SCRPC (stating a Rule 59(e) motion “may in the discretion of the court be determined on the briefs filed by the parties without oral argument”); *see also Pollard*, 314 S.C. 397, 401–02, 444 S.E.2d 534, 536 (Ct. App. 1994) (holding there was “no merit in Pollard's assertion that the circuit court committed reversible error in denying her motion to alter or amend the judgment under Rule 59(e) SCRPC,

without first conducting a hearing or allowing [the parties] ‘to fully brief’ the issues raised in [the motion”).

**AND IT IS SO ORDERED.**

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]



Richland Common Pleas

**Case Caption:** Portundo M Kimble , plaintiff, et al vs Jays Bar And Grill Llc

**Case Number:** 2023CP4003052

**Type:** Order/Other

So Ordered

s/ Daniel Coble, 2774

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF RICHLAND ) THE FIFTH JUDICIAL CIRCUIT

Portundo M. Kimble, as Personal ) Civil Action No.: 2023CP4003052  
 Representative of the Estate of Devon )  
 Enrique Kimble, Deceased, )

Plaintiff, ) ORDER DENYING PLAINTIFF'S  
 ) MOTION FOR DAMAGES

v. )

Jays Bar and Grill, LLC, )

Defendant. )

In the early morning hours of March 5, 2023, Devon Kimble was killed in a single-vehicle accident. He was intoxicated at the time of his death. His Estate filed a wrongful death suit against Jays Bar and Grill, LLC (“Jays”) where Devon was alleged to have consumed alcohol prior to the accident. Despite the tragedy of Devon’s death, the law does not permit damages to be awarded in this case. Accordingly, Plaintiff’s Motion for Default Damages (“Motion”) is therefore denied and judgment is entered in favor of the Defendant.

**PROCEDURAL HISTORY**

Plaintiff’s Decedent allegedly visited Jays on March 5, 2023, consumed alcohol, and became extremely intoxicated. Compl. ¶¶ 6-7 (Ex. 1). At approximately 2:00 a.m., Decedent left Jays and drove a vehicle with no passengers. Compl. ¶¶ 8-9. While driving, Decedent was involved in a single-car accident, resulting in the Plaintiff’s death. Compl. ¶¶ 9-10.

Plaintiff brought this action against Jays on June 12, 2023. *See* Compl. Plaintiff alleges negligence; negligence *per se*; and negligent hiring, training, supervision, and retention against Jays. *See* Compl. Plaintiff attempted to serve Jays’ registered agent, Jay Kalin, Jr. (“Kalin”), at an

address in Myrtle Beach, South Carolina, but was unsuccessful. Pl.'s Aff. of Non-Service (Ex. 2). Thereafter, Plaintiff attempted to serve Kalin at Jays several times but was unsuccessful. Pl.'s Aff. of Diligent Search (Ex. 3). Plaintiff then obtained an order for publication and submitted a publication about the Summons and Complaint in the Columbia based *Free Times* on August 9, 2023, August 16, 2023, and August 23, 2023. *See* Order for Publication (Ex. 4); Pl.'s Aff. of Publication (Ex. 5).

Plaintiff moved for an entry of default against Defendant on October 5, 2023. The Clerk of Court for Richland County entered default the following day. Defendant moved to set aside the default on March 22, 2024. The Court considered the motion at a hearing on August 5, 2024, and entered an order denying the motion on August 20, 2024.

Defendant moved the Court to alter or amend the denial of its motion to set aside on August 29, 2024. The Court denied the motion to alter or amend on September 3, 2024 and, a hearing on the instant Motion was held on September 17, 2024. Plaintiff was represented by Ronnie Richter and Defendant was represented by Ryan Holt and John Alphin. The Court heard testimony from Portundo M. Kimble and Veronica Martinez Kimble. The Court also heard arguments from counsel for both parties concerning the nature and amount of damages to be awarded. Attorneys on both sides of this case provided excellent briefing and persuasive oral arguments on a very tough legal question.

### **FINDINGS OF FACT**

“A defendant in default admits liability but not the damages as set forth in the prayer for relief.” *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, No. 2022-001224, 2024 WL 3811674, at \*8 (S.C. Ct. App. Aug. 14, 2024), *citing Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012). Therefore, in the case of a damages order on

a case in default, the findings of fact are those which are alleged in the Complaint. Accordingly, this Court assumes the facts as alleged in the Complaint for purposes of this order on damages.

Specifically, those facts include, but are not limited to, the following:

- While at Jay’s Bar and Grill on March 5, 2023, Decedent was served alcohol by Defendant to the point of becoming extremely and visibly intoxicated, in violation of South Carolina law.
- Upon information and belief, Decedent left Defendant’s establishment at approximately 2:00 am. Decedent had been served by the employees of Defendant, acting within the scope of their employment, to a point of gross intoxication.
- At approximately 2:00 am, Decedent was attempting to drive home when his motor vehicle left the roadway and was involved in a serious single-car accident.
- The Decedent was killed.
- Decedent’s blood alcohol content at the time of the accident was approximately three times the legal limit.

See Compl. ¶¶7-11. Other applicable facts include allegations, admitted for purposes of this Order, that Defendant allowed “Decedent to become grossly intoxicated by continuing to serve him more alcohol after they knew or should have known he was intoxicated,” and that his intoxication led to his death. Compl. ¶¶15, 22.

### CONTROLLING LAW

South Carolina precedent does not recognize a first party dram shop cause of action. *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 91, 504 S.E.2d 318, 319 (1990) (“We now join the majority of jurisdictions that have addressed this issue, and hold that South Carolina does not recognize a ‘first party’ cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of [S.C. Code Ann. §§ 61-4-580(2)] and/or [61-6-2220].”). The Supreme Court has made it clear that “public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct.” *Id.* at 92, 504 S.E.2d at 319-20. In this case,

Plaintiff filed a negligence cause of action against Jays alleging Jays violated South Carolina Code Sections 61-4-580 and 6-16-2220.

### **CONCLUSIONS OF LAW**

Before and since the hearing on Plaintiffs' Motion for Default Damages, the Court reviewed all of the pleadings, motions, memoranda, case law cited, and other evidence properly in the record. This case presents a singularly important legal question: Can a plaintiff recover damages against a defaulting party – where all factual allegations have been deemed admitted – when the causes of action alleged are not recognized under common law or statute? The Court answers this question in the negative and, therefore, denies the Plaintiff's Motion and request for damages.

The allegations of Plaintiff's Complaint clearly articulate a first-party dram shop case.

Pertinent paragraphs are cited verbatim below:

6. On the night of March 5, 2023, Decedent worked hard and looked forward to meeting friends at Jay's Bar and Grill.
7. Upon information and belief, while at Jay's Bar and Grill, Decedent was served alcohol by Defendant to the point of becoming extremely and visibly intoxicated, in violation of South Carolina law.
8. Upon information and belief, Decedent left Defendant's establishment at approximately 2:00 am. Decedent had been served by the employees of Defendant, acting within the scope of their employment, to a point of gross intoxication.
9. At approximately 2:00 am, Decedent was attempting to drive home when his motor vehicle left the roadway and was involved in a serious single-car accident.
10. The Decedent was killed.
11. His blood alcohol content at the time of the accident was approximately three times the legal limit.

Compl. ¶¶6-11.

The Court has spent a generous amount of time researching this issue, and while it appears there is no state court case on point, there are many decisions from the District of South Carolina that provide guidance and support for this ruling. For example, in *State Farm v. Stephens*, 2020 WL 8643790, Judge Norton noted that when a party is in default,

the court accepts a plaintiff's well-pleaded **factual** allegations as true. However, a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff's right to recover. As such, **the court need not accept the plaintiff's legal conclusions and must determine whether the plaintiff's allegations support the relief sought. The party moving for default judgment must still show** that the defaulted party was properly served and **that the unchallenged factual allegations constitute a legitimate cause of action.** If the court determines that service was proper and that the allegations entitle the plaintiff to relief, then it must then determine the appropriate amount of damages. (Emphasis added and internal citations omitted).

This holding has been echoed in many other DSC decisions. *See Certain Underwriters at Lloyd's, London v. Water Mgmt. Consultants & Testing, Inc.*, 2022 WL 16541132 (same holding); *Velarde v. Covercraft Industries, LLC*, 2024 WL 2942914 (same holding); *Atrium Corporate Capital Limited v. Williams*, 2023 WL 8282769 (same holding); *Auto-Owners Insurance Company v. Leysath*, 2023 WL 11886065 (same holding); *Progressive Northern Insurance Company v. Geoffroy*, 2023 WL 6462851 (same holding); *Peppers-Jeridore v. T. Bayou, LLC*, 2020 WL 85223 (“[T]he defendant is not held to have admitted conclusions of law, or allegations that concern only damages ... Thus, a court considering default judgment must still determine if the established factual allegations constitute a legitimate cause of action and provide a sufficient basis the relief sought.”) (internal citations omitted).

While these decisions involve the application of FRCP 55 and not SCRCP 55, a review of the Official Reporter's Notes of SCRCP 55 reveals that much of the state Rule 55 is “drawn from” (Rule 55(a) and (b)(1)) or “identical to” (Rule 55(c) and (d)) its federal counterpart. Also, in regard to Rule 55(b)(2) – which is not in the federal rule – the Official Reporter notes that this subsection

was “added to preserve Circuit Court Rule 38, requiring attachment of property against which the money judgment may be collected, when the defendant has not been personally served and does not appear in the action.” In sum, there appears to be no difference between the federal and state Rule 55 that impacts the question at issue here, and the Court finds the above cases persuasive and applicable to the case at hand.

In addition to the above, there are other reasons this position appears the more prudent legal position. For example, the Supreme Court in *Tobias v. The Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), makes it clear that there is no recognized common law or statutory “first party” dram shop cause of action in South Carolina, which are the only claims raised in Plaintiff’s Complaint.<sup>1</sup> See *Tobias*, at 91, 504 S.E.2d 318, 319 (“We now join the majority of jurisdictions that have addressed this issue, and hold that South Carolina does not recognize a ‘first party’ cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of [S.C. Code Ann. §§ 61-4-580(2)] and/or [61-6-2220].”). The Supreme Court is clear that “public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct.” *Id.* at 92, 504 S.E.2d at 319-20.

No authority was presented – nor could this court find any – that would support the position that a plaintiff who sues a party that happens to fail to timely answer is entitled to more legal rights and remedies than a similar plaintiff who sues a party that files a timely responsive pleading. Such

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<sup>1</sup> The Supreme Court has done this in other cases as well. For example, it declined to recognize a cause of action for “wrongful life” despite the fact that it is otherwise “well established in South Carolina that a viable fetus harmed in utero by the act or omission of another, including a physician or other health care provider, may seek damages from the negligent tortfeasor.” *Willis v. Wu*, 362 S.C. 146, 154, 607 S.E.2d 63, 67 (2004) (citations omitted). The Supreme Court acted similarly by refusing to recognize a cause of action for third party spoliation. *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 714 S.E.2d 537 (2011). It may also abolish causes of action, and thus previously recoverable damages, as it did with criminal conversation and alienation of affections. *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992).

a scenario would leave to chance – or perhaps efforts to manufacture default situations – whether parties could avail themselves of legal claims that the Supreme Court has expressly ruled do not exist. Such a substantial expansion of legal rights and remedies - including those expressly rejected by the Supreme Court – based solely on whether a party timely responds to a complaint is unsupported by any law or precedent. Moreover, such a scenario might lead to complaints being filed (in hopes of a default situation) alleging causes of action that parties and their attorneys know do not have a “good ground to support” them at the time of filing. If the defendants do appear and move to dismiss these claims, *Tobias* would appear to require dismissal and could also lead to requests for relief under Rule 11 and/or the South Carolina Frivolous Proceedings Sanctions Act, all of which would create what would seem to be unnecessary litigation for our state courts to handle.

What other effects might allowing recovery on these unrecognized claims have? Would parties in family court bring claims for alienation of affection in hopes that the adverse party defaults? Would parties bring claims recognized in other jurisdictions but not South Carolina in hopes the opposing party would default? Importantly, the Court is not saying these questions have any relation to this case or the sincerity of the Plaintiff’s intentions in this matter. However, when faced with a novel issue of law that would have wider implications than just this case, attention needs to be paid to the potential effects of a ruling on either side of the issue.

The types of damages available in a particular case are determined by law. *See e.g. Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 118, 584 S.E.2d 379, 382 (2003) (“Workers’ compensation benefits do not include all the various types of damages that may be recovered in a personal injury suit against a third party tortfeasor. For example, in a personal injury suit, the ‘loss compensable in a personal injury action includes such elements as pain and suffering,

disfigurement, medical expenses, and lost earning capacity.”) (internal citations omitted); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 316, 737 S.E.2d 601, 620 (2013) (“Not all damages suffered by a private property owner at the hands of [a] governmental agency are compensable.”) (internal citations omitted).<sup>2</sup> Damages are not recoverable in the absence of a legally cognizable cause of action. Because South Carolina has not recognized a first-party dram shop cause of action, damages for such a cause are also unrecognized. Therefore, there is no available recovery for a party making a claim under such a theory, even if all the **factual** allegations contained in the Complaint are deemed to be admitted and true.

IT IS THEREFORE ORDERED THAT Plaintiff’s Motion is DENIED and the Court awards no damages and as a result, judgment is entered in favor of the Defendant.

*[Judge’s signature page to follow]*

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<sup>2</sup> See also Volume II, Part II of *South Carolina Damages*, eds. Terry E. Richardson, Jr. and Daniel S. Haltiwanger (Columbia, SC: South Carolina Bar, 2004), which contains damages for 29 separate and specific causes of action.



Richland Common Pleas

**Case Caption:** Portundo M Kimble , plaintiff, et al vs Jays Bar And Grill Llc

**Case Number:** 2023CP4003052

**Type:** Order/Damages

So Ordered

s/ Thomas W. McGee III, Judge Code 2786

Electronically signed on 2024-10-28 15:22:49 page 9 of 9

Portundo M Kimble et al  
PLAINTIFF(S)

Jays Bar And Grill Llc  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (*CHECK REASON*):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

Plaintiff timely filed a Rule 59 Motion to Alter or Amend the Court's Order of 10/29/24. After reviewing the briefing by both parties, the earlier submissions by the parties on the underlying motion, applicable statutes and case law, and all other matters properly before the Court, Plaintiff's Motion to Alter or Amend the 10/29/24 Order is respectfully denied.

**ORDER INFORMATION**

This order  ends  does not end the case.  See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/06/2024 .

The Estate Of Devon Enrique Kimble

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

**Case Caption:** Portundo M Kimble , plaintiff, et al vs Jays Bar And Grill Llc

**Case Number:** 2023CP4003052

**Type:** Order/Electronic Form 4

So Ordered

s/ Thomas W. McGee III, Judge Code 2786

Electronically signed on 2024-12-06 11:41:10 page 3 of 3

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND )

Portundo M. Kimble, as Personal )  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )

Plaintiff, )

vs. )

Jays Bar and Grill, LLC )

Defendant. )

**SUMMONS**

**TO THE ABOVE-NAMED DEFENDANT:**

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to appear and defend this action by answering the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

Lexington, South Carolina  
June 12, 2023

**BLAND RICHTER, LLP**  
*Attorneys for the Plaintiff*

s/Eric S. Bland  
Eric S. Bland (SC Bar No. 64132)  
105 West Main Street, Suite D  
Lexington, South Carolina 29072  
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s/Ronald L. Richter, Jr  
Ronald L. Richter, Jr. (SC Bar No. 66377)

s/Scott M. Mongillo  
Scott M. Mongillo (SC Bar No. 16574)  
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,	)	
	)	
	)	
Plaintiff,	)	<b>COMPLAINT</b>
	)	<b>(Wrongful Death and Survival)</b>
vs.	)	
	)	
Jays Bar and Grill, LLC	)	
	)	
	)	
Defendant.	)	<b>JURY TRIAL DEMAND!</b>

COMES NOW Plaintiff, Portundo M. Kimble ("Plaintiff), duly appointed in Richland County as the Personal Representative of the Estate of Devon Enrique Kimble, deceased ("Decedent"), by and through his undersigned attorneys and complains of the Defendant as follows:

**PARTIES**

1. Plaintiff, as the duly appointed Personal Representative of the Decedent's Estate, has the right and authority to bring this wrongful death action on behalf of Decedent's beneficiaries under the South Carolina Wrongful Death Act, S.C. Code § 15-51-10 *et seq.*, this survival action on behalf of Decedent's Estate under S.C. Code § 15-5-90 *et seq.*, and this civil action for negligence, negligence *per se*, dram shop, and related claims. Plaintiff is a citizen and resident of Blythewood, South Carolina.

2. Decedent was a citizen and resident of Richland County, South Carolina at the time of the collision that took his life.

3. Defendant Jay's Bar and Grill ("Defendant") is a South Carolina corporation having a principal place of business at 902 Gervais Street, Suite D, Columbia, South Carolina, 29205.

**JURISDICTION AND VENUE**

4. The fatal incident that caused the death of the Decedent occurred on March 5, 2023, in Richland County, South Carolina. Furthermore, Defendant owns real and personal property and/or regularly conducts business in Richland County, South Carolina. The acts and omissions by Defendant that caused Decedent's death occurred in Richland County.

5. For these reasons, this Court has personal jurisdiction over the parties to this action and subject matter jurisdiction over the claims asserted in the Complaint and venue is proper.

**STATEMENT OF FACTS**

6. On the night of March 5, 2023, Decedent worked hard and looked forward to meeting friends at Jay's Bar and Grill.

7. Upon information and belief, while at Jay's Bar and Grill, Decedent was served alcohol by Defendant to the point of becoming extremely and visibly intoxicated, in violation of South Carolina law.

8. Upon information and belief, Decedent left Defendant's establishment at approximately 2:00 am. Decedent had been served by the employees of Defendant, acting within the scope of their employment, to a point of gross intoxication.

9. At approximately 2:00 am, Decedent was attempting to drive home when his motor vehicle left the roadway and was involved in a serious single-car accident.

10. The Decedent was killed.

11. His blood alcohol content at the time of the accident was approximately three times the legal limit.

**FOR A FIRST CAUSE OF ACTION**  
*(Negligence and Dram Shop)*

12. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

13. At all relevant times hereto, Defendant sold alcohol at Decedent for profit as a commercial, licensed enterprise. Defendant offered beer, wine, and hard liquor beverages subject to licensing by the State of South Carolina and subject to all applicable statutes and state administrative regulations concerning the sale and consumption of alcohol.

14. Defendant, as a commercial server of intoxicating beverages, owed Decedent a duty not to allow its patrons to become visibly intoxicated, not to serve alcohol to its intoxicated patrons, and to protect Decedent from the possible consequences of his intoxication and he became intoxicated as a result of the alcohol sold by Defendant.

15. Defendant breached these duties by allowing Decedent to become grossly intoxicated and by continuing to serve him more alcohol after they knew or should have known he was intoxicated. Defendant, by and through its employees and agents, served Decedent alcohol while he was intoxicated in violation of the statutory and common law of South Carolina.

16. At all relevant times hereto, Defendant was responsible for the actions of its agents, servants, employees, or managers serving alcohol to any patron, including Decedent. Defendant is both directly and vicariously liable for the conduct complained of herein regarding the actions or inactions and their consequences.

17. On or about the evening hours of March 5, 2023, Defendant through its agents, servants, employees, or managers did serve or provide Decedent a quantity of alcohol which resulted in Decedent becoming extremely intoxicated, and continued to serve him after he became extremely intoxicated.

18. The alcoholic beverages which were sold, provided, and consumed by Decedent by the agents and employees of Defendant, contributed to, or caused Decedent to become and remain intoxicated at all times relevant hereto.

19. Decedent's blood alcohol content at the time of the accident was approximately three times the legal limit prescribed by the laws of the State of South Carolina.

20. Defendant knew or should have known that Decedent had been served alcohol by Defendant's agents, servants, employees, or managers to the point that he was extremely intoxicated and incapable of safely operating a motor vehicle.

21. However, after consuming alcoholic beverages provided by Defendant over the course of a few hours, Decedent, in a grossly intoxicated state, got into his motor vehicle.

22. The intoxication of Decedent, collision, injuries, damages, and death, as described in this Complaint, were the direct, foreseeable and proximate result of the negligent, careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant, and that Defendant was independently, concurrently, and jointly negligent and grossly negligent, willful, and wanton in the following particulars to wit:

- a) Serving alcoholic beverages to Decedent while Decedent was intoxicated;
- b) Allowing Decedent to consume alcoholic beverages to excess on the premises of Defendant;
- c) Allowing Decedent to consume alcoholic beverages to excess and then allowing him to drive a motor vehicle while intoxicated in violation of the laws of the State of South Carolina;
- d) Allowing the service of alcoholic beverages by its agents, servant employees, or managers to Decedent, when Defendant knew or should have known he was intoxicated, in violation of the common law and Sections 61-4-580 and 61-6-2220 of the South Carolina Code of Laws;

- e) Allowing the service of alcoholic beverages by its agents, servant employees, or managers to Decedent, in an amount enabling him to become intoxicated, in violation of the common law and statutory laws of the State of South Carolina;
- f) Failing to appreciate Decedent's intoxication while permitting him to continue to be served and consume alcoholic beverages while on the premises of Defendant, and in failing to provide Decedent a safe means of transportation;
- g) Failing to ensure that after allowing alcohol to be served to, and consumed by, Decedent, that he would not drive upon the roadways of the State of South Carolina;
- h) Failing to properly and adequately supervise their agents, servant employees, or managers with regard to the service to and consumption of alcohol by Decedent while on the premises of Defendant;
- i) Failing to implement or maintain policies and procedures that would ensure that its agents, servants, employees, or managers would not serve its customers, such as Decedent, once they became intoxicated;
- j) Deviating from the accepted standard of care in allowing its agents, servants, employees, or managers to continue to serve its customers after they were intoxicated;
- k) Failing to have a policy, or failed to enforce their policy, that no agents, servants, employees, or managers were allowed to serve customers alcohol after they were intoxicated;
- l) Violating state statutes and regulations that concern the sale and service of alcohol and that Defendant violated those statutes and regulations;
- m) Serving alcoholic beverages to Decedent when Defendant knew or should have known the amount would make Decedent intoxicated and served Decedent alcohol while he was intoxicated in violation of common law and South Carolina law;
- n) After serving Decedent when Defendant knew or should have known Decedent was intoxicated Defendant failed to ensure a safe means of transportation for Decedent and failed to ensure that Decedent would not drive upon the roadways of Columbia, South Carolina;
- o) Failing to properly and adequately train and qualify its employees in regard to their duties and responsibilities for the service of alcohol;
- p) Failing to monitor the activities of its employees resulting in improper service of

alcohol;

- q) Deviating from the standard of care in the training and supervision of employees in the service of alcohol; and
- r) Creating an atmosphere of encouragement, tolerance, and acquiescence allowing employees to serve alcohol to customers after they were intoxicated which created a dangerous and unsafe environment resulting in Decedent's extreme intoxication and subsequent collision.

All such acts and omissions, or both, were the actual, direct and proximate cause of the damages, injuries and death claimed herein.

23. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.

24. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, the Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

25. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant as set out above, as well as its violation of state law, Plaintiff is entitled to recover

actual and punitive damages, jointly and severally, as determined by a jury.

**FOR A SECOND CAUSE OF ACTION**

*(Negligence Per Se)*

26. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

27. Defendant permitted, enabled, and condoned Decedent to purchase or obtain and be served alcoholic beverages that he consumed on the premises of Defendant, which resulted in Decedent becoming intoxicated.

28. That upon Decedent becoming intoxicated, Defendant continued to permit, enable, and condone the additional purchase and/or consumption and service of alcoholic beverages to Decedent, which he consumed on the premises of Defendant.

29. That Defendant permitting, enabling, and condoning the continued purchase, service, and/or consumption of alcoholic beverages by Decedent while he was in a state of intoxication is a violation of Sections 61-4-580 and 61-6-2220 of the South Carolina Code of Laws. Decedent was a member of the class of persons that the cited statutes are specifically intended to protect.

30. That the said violation of the noted statutes by Defendant constitutes *negligence per se*, and is evidence of reckless, willful, and wanton conduct and was one of the contributing causes of Decedent's death.

31. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental

shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.

32. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

33. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of the Defendant as set out above, as well as their violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

**FOR A THIRD CAUSE OF ACTION**  
*(Negligent Hiring, Training, Supervision, and Retention)*

34. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

35. At all relevant times hereto, Defendant was responsible for the hiring, training, supervision, and retention of its agents, servants, employees, and managers.

36. Defendant owed statutory and common law duties to the Decedent not to negligently hire, train, supervise, and retain employees.

37. At all times material to this Complaint, Defendant knew, or had reason to know, that it had the ability and obligation to control and supervise its agents, servants, employees, and managers.

38. Defendant knew, or had reason to know, that its customers were likely to be

served and consume alcoholic beverages on the premises of Defendant, to the point of intoxication, and then drive while intoxicated, putting third persons at risk of sustaining injury or death.

39. Defendant knew, or had reason to know, of the necessity and opportunity for exercising control and supervision over its agents, servants, employees, and managers, so that third persons would not be put at risk of sustaining injury and death.

40. Defendant, having full knowledge of the noted propensities of its agents, servants, employees, and managers, negligently, carelessly, recklessly, willfully, and wantonly hired, trained, retained, and supervised them in the conduct and performance of their various employment duties on Defendant's premises.

41. As a proximate result of Defendant's negligent, careless, grossly negligent, reckless, willful, and wanton hiring, training, retention, and supervision of its agents, servants, employees, and managers, Decedent left the premises of Defendant on March 5, 2023, and proceeded to drive a motor vehicle in a dangerous and unsafe manner while extremely intoxicated.

42. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs

of himself and his beneficiaries.

43. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

44. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant as set out above, as well as its violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

WHEREFORE, having stated its factual allegations and causes of action against Defendant, the Personal Representative prays for the following:

- i. A trial by jury;
- ii. Judgment against Defendant for actual, consequential and punitive damages pled herein in an amount to be determined by the jury;
- iii. For the costs of this action; and
- iv. For such other and further relief as this court deems just and proper.

Lexington, South Carolina  
June 12, 2023

**BLAND RICHTER, LLP**  
*Attorneys for the Plaintiff*

s/Eric S. Bland  
Eric S. Bland (SC Bar No. 64132)  
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s/Ronald L. Richter, Jr

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s/Scott M. Mongillo

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scott@blandrichter.com

# STATE OF SOUTH CAROLINA

## AFFIDAVIT OF DILIGENT SEARCH

RICHLAND COUNTY

COURT OF, COMMON PLEAS

DOCKET # 2023-CP-40-3052

PORTUNDO M. KIMBLE, A PERSONAL REPRESENTATIVE OF

THE ESTATE OF DEVON ENRIQUE KIMBLE, DECEASED

-VS-

JAYS BAR AND GRILL, LLC

THE UNDERSIGNED, JEFF COSTNER, BEING DULY SWORN STATES HE ATTEMPTED SERVICE ON THE FOLLOWING DOCUMENTS : (1) SUMMONS (2) COMPLAINT (3) PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT (4) PLAINTIFF'S FIRST REQUEST FOR PRODUCTION TO DEFENDANT

IN THE FOREGOING ACTION ON : JAYS BAR AND GRILL, LLC


AFTER A DILIGENT SEARCH THIS PERSON CANNOT BE LOCATED AND THE PROCESS SERVER STATES HE HAS ATTEMPTED SERVICE ON THE FOLLOWING DATES, TIMES AND ADDRESSES.

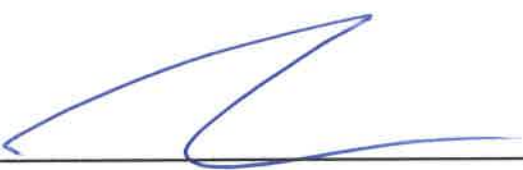
THE SERVER, JEFF COSTNER HAS MADE THE FOLLOWING ATTEMPTS TO SERVE A JAY KALIN, JR, WHO IS THE REGISTERED AGENT FOR SERVICE FOR JAYS BAR AND GRILL, LLC AT THE BUSINESS LOCATION AT, 902 GERVAIS STREET, SUITE D, COLUMBIA, SOUTH CAROLINA 29201, ON JUNE 20, 2023, AT 8:45 am, THE SERVER WAS TOLD HE WAS NOT THERE, MAY BE IN LATE THAT AFTERNOON, ATTEMPTED AGAIN ON JUNE 20, 2023 AT 4:40 pm, SERVER WAS TOLD HE IS NOT THERE, AND WAS NOT COMING IN THAT DAY, ATTEMPTED ON JUNE 21, 2023 AT 5:10 pm, THE SERVER WAS TOLD HE IS NOT THERE AND HE WAS TOLD THEY DID NOT KNOW IF HE WAS COMING IN OR NOT. ATTEMPTED ON JUNE 22, 2023 AT 5:00 pm, THE SERVER WAS TOLD HE WAS NOT THERE. THE SERVER HAS NOTICES THAT THERE IS USUALLY A BLACK PORSCHE IN THE BACK PARKING LOT ON SEVERAL OCCASIONS, WHEN ATTEMPTED AND BELIEVED TO BE THE VEHICLE THAT JAY KALIN JR DRIVES, ATTEMPTED ON JULY 05, 2023 AT 9:00 am, THE FRONT DOOR WAS OPEN AT THE RESTAURANT, THE SERVER HOLLERED SEVERAL TIMES AND WAS UNABLE TO GET ANYONE TO COME UP TO THE BAR AREA. ATTEMPTED ON JULY 06, 2023 AT 8:10 pm, A WHITE MALE AT THE FRONT GATE TOLD THE SERVER HE WAS NOT THERE, ATTEMPTED SERVICE AGAIN ON JULY 14, 2023 AT 10:00 am, THE BLACK PORSCHE WAS IN THE BACK BUT THE SERVER WAS TOLD BY A BLACK MALE HE WAS

ROA-0035

NOT IN TODAY. ATTEMPTED ON JULY21, 2023 AT 3:30 pm, AND WAITED UNTIL 5:10 pm, A BLACK MALE CAME OUT AND TOLD THE SERVER HE WAS NOT COMING IN TODAY.


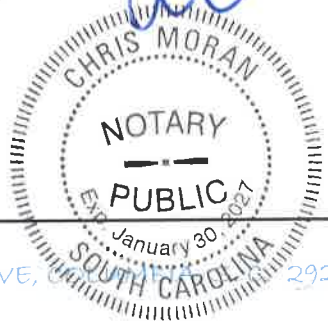
THE SERVER HAS ALSO ATTEMPTED A SECOND ADDRESS AT, 621 GADSDEN STREET, SUITE A, COLUMBIA, SOUTH CAROLINA 29201, THIS ADDRESS IS JAY'S VAPE SHOP, A WHITE MALE TOLD THE SERVER THAT HE IS USALY NOT AT THIS ADDRESS, JUST ONCE IN A WHILE. THE SERVER HAS LEFT A BUSINESS CARD WITH EMPLOYEES SEVERAL TIMES WITH NO RETURN CALLS. THE SERVER HAS SEARCHED FOR ANY OTHER ADDRESSES, SOCIAL MEDIA AND HAS NOT LOCATED ANYTHING BUT THE BUSINESS LOCATION.

  
\*\* JEFF COSTNER – PROCESS SERVER \*\*



SWORN BEFORE ME THIS, 23rd DAY OF, JULY 2023

MY COMMISSION EXPIRES : 1-30-27

COSTNER'S LEGAL SERVICE, 2109 KATHLEEN DRIVE, SOUTH CAROLINA 29210

**AFFIDAVIT OF NON-SERVICE**

State of South Carolina

County of Richland

Common Pleas Court

Case Number: 2023-CP-40-3052

Plaintiff:

**Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,**

vs.

Defendant:

**Jays Bar and Grill, LLC**

For:

Bland Richter LLP  
105 West Main Street, Suite D  
Lexington, SC 29072

Received by Milligan & Associates LLC to be served on **JAYS BAR AND GRILL LLC c/o Jay Kalin, Jr Registered Agent, 104 High Circle 8 B, Myrtle Beach, SC 29572.**

I, Roger Turner, being duly sworn, depose and say that on the **13th day of June, 2023 at 12:15 pm, I:**

**NON-SERVED:** After due search, careful inquiry and diligent attempts I was unable to serve the **Summons and Complaint** for the reason that, **RENTAL PROEPRTY OWNED BY THE DEFENDANT - WHEREABOUTS UNK PER OCCUPANT** ,or information to allow further search.

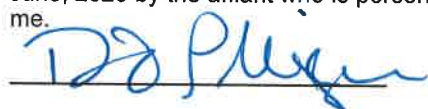
I certify that I am over the age of 18, have no interest in the above action, and in good standing, in the judicial circuit in which the process was served.



**Roger Turner**  
Process Server

**Milligan & Associates LLC**  
Process@MilliganAndAssociates.com  
P.O. Box 4845  
Florence, SC 29502-4845  
(843) 667-4747

Subscribed and Sworn to before me on the 14th day of June, 2023 by the affiant who is personally known to me.



PRINT NAME

NOTARY PUBLIC



Our Job Serial Number: DPM-2023000360  
Ref: Kimble v. Jays Bar

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND ) CIVIL ACTION NUMBER: 2023-CP-40-03052

Portundo M. Kimble, as Personal )  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )

**PETITION FOR SERVICE BY  
PUBLICATION**

)  
)  
)  
)  
Plaintiff, )

vs. )

Jays Bar and Grill, LLC )

)  
)  
)  
Defendant. )

The Petitioner/Plaintiff in the above-captioned matter would respectfully show unto the Court that:

It is represented that Defendant as named below with last known address, should be served by publication with the Summons and Complaint filed on June 12, 2022 (attached hereto as **Exhibit A**); because the identity and/or address of such person and/or entity is not known and cannot be ascertained with reasonable diligence (attempts at service are attached hereto as **Exhibit B**).

**NAME**

Jay Kalin, Jr., Registered Agent  
for Jays Bar and Grill, LLC

**LAST KNOWN ADDRESS**

104 High Circle 8B  
Myrtle Beach, SC 29572  
(address on file with SC Secretary of State)

902 Gervais Street, Suite D  
Columbia, SC 29201  
(business location)

The undersigned requests that an order be entered directing service by publication in the newspaper named The Free Times newspaper,

Respectfully submitted,

**BLAND RICHTER, LLP**

*s/Eric S. Bland*

---

Eric S. Bland (SC Bar No. 64132)  
1500 Calhoun Street  
Post Office Box 72  
Columbia, South Carolina 29202  
803.256.9664 (telephone)  
803.256.3056 (facsimile)  
[ericbland@blandrichter.com](mailto:ericbland@blandrichter.com) (e-mail)

Ronald L. Richter, Jr. (SC Bar No. 66377)  
Scott M. Mongillo (SC Bar No. 16574)  
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[ronnie@blandrichter.com](mailto:ronnie@blandrichter.com) (e-mail)  
[scott@blandrichter.com](mailto:scott@blandrichter.com) (e-mail)

*Attorneys for Plaintiff*

July 31, 2023  
Lexington, South Carolina

## **EXHIBIT A**

***Portoundo M. Kimble, as Personal Representative of the Estate of Devon Enrique  
Kimble, Deceased v. Jays Bar and Grill, LLC***

**Civil Action Number: 2023-CP-40-03052**

### **Summons and Complaint**

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND )

Portundo M. Kimble, as Personal )  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )

Plaintiff, )

vs. )

Jays Bar and Grill, LLC )

Defendant. )

**SUMMONS**

**TO THE ABOVE-NAMED DEFENDANT:**

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to appear and defend this action by answering the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

Lexington, South Carolina  
June 12, 2023

**BLAND RICHTER, LLP**  
*Attorneys for the Plaintiff*

s/Eric S. Bland  
Eric S. Bland (SC Bar No. 64132)  
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,	)	
	)	
	)	
Plaintiff,	)	<b>COMPLAINT</b>
	)	<b>(Wrongful Death and Survival)</b>
vs.	)	
	)	
Jays Bar and Grill, LLC	)	
	)	
Defendant.	)	<b>JURY TRIAL DEMAND!</b>

COMES NOW Plaintiff, Portundo M. Kimble ("Plaintiff"), duly appointed in Richland County as the Personal Representative of the Estate of Devon Enrique Kimble, deceased ("Decedent"), by and through his undersigned attorneys and complains of the Defendant as follows:

**PARTIES**

1. Plaintiff, as the duly appointed Personal Representative of the Decedent's Estate, has the right and authority to bring this wrongful death action on behalf of Decedent's beneficiaries under the South Carolina Wrongful Death Act, S.C. Code § 15-51-10 *et seq.*, this survival action on behalf of Decedent's Estate under S.C. Code § 15-5-90 *et seq.*, and this civil action for negligence, negligence *per se*, dram shop, and related claims. Plaintiff is a citizen and resident of Blythewood, South Carolina.

2. Decedent was a citizen and resident of Richland County, South Carolina at the time of the collision that took his life.

3. Defendant Jay's Bar and Grill ("Defendant") is a South Carolina corporation having a principal place of business at 902 Gervais Street, Suite D, Columbia, South Carolina, 29205.

### **JURISDICTION AND VENUE**

4. The fatal incident that caused the death of the Decedent occurred on March 5, 2023, in Richland County, South Carolina. Furthermore, Defendant owns real and personal property and/or regularly conducts business in Richland County, South Carolina. The acts and omissions by Defendant that caused Decedent's death occurred in Richland County.

5. For these reasons, this Court has personal jurisdiction over the parties to this action and subject matter jurisdiction over the claims asserted in the Complaint and venue is proper.

### **STATEMENT OF FACTS**

6. On the night of March 5, 2023, Decedent worked hard and looked forward to meeting friends at Jay's Bar and Grill.

7. Upon information and belief, while at Jay's Bar and Grill, Decedent was served alcohol by Defendant to the point of becoming extremely and visibly intoxicated, in violation of South Carolina law.

8. Upon information and belief, Decedent left Defendant's establishment at approximately 2:00 am. Decedent had been served by the employees of Defendant, acting within the scope of their employment, to a point of gross intoxication.

9. At approximately 2:00 am, Decedent was attempting to drive home when his motor vehicle left the roadway and was involved in a serious single-car accident.

10. The Decedent was killed.

11. His blood alcohol content at the time of the accident was approximately three times the legal limit.

**FOR A FIRST CAUSE OF ACTION**  
*(Negligence and Dram Shop)*

12. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

13. At all relevant times hereto, Defendant sold alcohol at Decedent for profit as a commercial, licensed enterprise. Defendant offered beer, wine, and hard liquor beverages subject to licensing by the State of South Carolina and subject to all applicable statutes and state administrative regulations concerning the sale and consumption of alcohol.

14. Defendant, as a commercial server of intoxicating beverages, owed Decedent a duty not to allow its patrons to become visibly intoxicated, not to serve alcohol to its intoxicated patrons, and to protect Decedent from the possible consequences of his intoxication and he became intoxicated as a result of the alcohol sold by Defendant.

15. Defendant breached these duties by allowing Decedent to become grossly intoxicated and by continuing to serve him more alcohol after they knew or should have known he was intoxicated. Defendant, by and through its employees and agents, served Decedent alcohol while he was intoxicated in violation of the statutory and common law of South Carolina.

16. At all relevant times hereto, Defendant was responsible for the actions of its agents, servants, employees, or managers serving alcohol to any patron, including Decedent. Defendant is both directly and vicariously liable for the conduct complained of herein regarding the actions or inactions and their consequences.

17. On or about the evening hours of March 5, 2023, Defendant through its agents, servants, employees, or managers did serve or provide Decedent a quantity of alcohol which resulted in Decedent becoming extremely intoxicated, and continued to serve him after he became extremely intoxicated.

18. The alcoholic beverages which were sold, provided, and consumed by Decedent by the agents and employees of Defendant, contributed to, or caused Decedent to become and remain intoxicated at all times relevant hereto.

19. Decedent's blood alcohol content at the time of the accident was approximately three times the legal limit prescribed by the laws of the State of South Carolina.

20. Defendant knew or should have known that Decedent had been served alcohol by Defendant's agents, servants, employees, or managers to the point that he was extremely intoxicated and incapable of safely operating a motor vehicle.

21. However, after consuming alcoholic beverages provided by Defendant over the course of a few hours, Decedent, in a grossly intoxicated state, got into his motor vehicle.

22. The intoxication of Decedent, collision, injuries, damages, and death, as described in this Complaint, were the direct, foreseeable and proximate result of the negligent, careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant, and that Defendant was independently, concurrently, and jointly negligent and grossly negligent, willful, and wanton in the following particulars to wit:

- a) Serving alcoholic beverages to Decedent while Decedent was intoxicated;
- b) Allowing Decedent to consume alcoholic beverages to excess on the premises of Defendant;
- c) Allowing Decedent to consume alcoholic beverages to excess and then allowing him to drive a motor vehicle while intoxicated in violation of the laws of the State of South Carolina;
- d) Allowing the service of alcoholic beverages by its agents, servant employees, or managers to Decedent, when Defendant knew or should have known he was intoxicated, in violation of the common law and Sections 61-4-580 and 61-6-2220 of the South Carolina Code of Laws;

- e) Allowing the service of alcoholic beverages by its agents, servant employees, or managers to Decedent, in an amount enabling him to become intoxicated, in violation of the common law and statutory laws of the State of South Carolina;
- f) Failing to appreciate Decedent's intoxication while permitting him to continue to be served and consume alcoholic beverages while on the premises of Defendant, and in failing to provide Decedent a safe means of transportation;
- g) Failing to ensure that after allowing alcohol to be served to, and consumed by, Decedent, that he would not drive upon the roadways of the State of South Carolina;
- h) Failing to properly and adequately supervise their agents, servant employees, or managers with regard to the service to and consumption of alcohol by Decedent while on the premises of Defendant;
- i) Failing to implement or maintain policies and procedures that would ensure that its agents, servants, employees, or managers would not serve its customers, such as Decedent, once they became intoxicated;
- j) Deviating from the accepted standard of care in allowing its agents, servants, employees, or managers to continue to serve its customers after they were intoxicated;
- k) Failing to have a policy, or failed to enforce their policy, that no agents, servants, employees, or managers were allowed to serve customers alcohol after they were intoxicated;
- l) Violating state statutes and regulations that concern the sale and service of alcohol and that Defendant violated those statutes and regulations;
- m) Serving alcoholic beverages to Decedent when Defendant knew or should have known the amount would make Decedent intoxicated and served Decedent alcohol while he was intoxicated in violation of common law and South Carolina law;
- n) After serving Decedent when Defendant knew or should have known Decedent was intoxicated Defendant failed to ensure a safe means of transportation for Decedent and failed to ensure that Decedent would not drive upon the roadways of Columbia, South Carolina;
- o) Failing to properly and adequately train and qualify its employees in regard to their duties and responsibilities for the service of alcohol;
- p) Failing to monitor the activities of its employees resulting in improper service of

alcohol;

- q) Deviating from the standard of care in the training and supervision of employees in the service of alcohol; and
- r) Creating an atmosphere of encouragement, tolerance, and acquiescence allowing employees to serve alcohol to customers after they were intoxicated which created a dangerous and unsafe environment resulting in Decedent's extreme intoxication and subsequent collision.

All such acts and omissions, or both, were the actual, direct and proximate cause of the damages, injuries and death claimed herein.

23. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.

24. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, the Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

25. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant as set out above, as well as its violation of state law, Plaintiff is entitled to recover

actual and punitive damages, jointly and severally, as determined by a jury.

**FOR A SECOND CAUSE OF ACTION**

*(Negligence Per Se)*

26. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

27. Defendant permitted, enabled, and condoned Decedent to purchase or obtain and be served alcoholic beverages that he consumed on the premises of Defendant, which resulted in Decedent becoming intoxicated.

28. That upon Decedent becoming intoxicated, Defendant continued to permit, enable, and condone the additional purchase and/or consumption and service of alcoholic beverages to Decedent, which he consumed on the premises of Defendant.

29. That Defendant permitting, enabling, and condoning the continued purchase, service, and/or consumption of alcoholic beverages by Decedent while he was in a state of intoxication is a violation of Sections 61-4-580 and 61-6-2220 of the South Carolina Code of Laws. Decedent was a member of the class of persons that the cited statutes are specifically intended to protect.

30. That the said violation of the noted statutes by Defendant constitutes *negligence per se*, and is evidence of reckless, willful, and wanton conduct and was one of the contributing causes of Decedent's death.

31. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental

shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.

32. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

33. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of the Defendant as set out above, as well as their violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

**FOR A THIRD CAUSE OF ACTION**

*(Negligent Hiring, Training, Supervision, and Retention)*

34. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

35. At all relevant times hereto, Defendant was responsible for the hiring, training, supervision, and retention of its agents, servants, employees, and managers.

36. Defendant owed statutory and common law duties to the Decedent not to negligently hire, train, supervise, and retain employees.

37. At all times material to this Complaint, Defendant knew, or had reason to know, that it had the ability and obligation to control and supervise its agents, servants, employees, and managers.

38. Defendant knew, or had reason to know, that its customers were likely to be

served and consume alcoholic beverages on the premises of Defendant, to the point of intoxication, and then drive while intoxicated, putting third persons at risk of sustaining injury or death.

39. Defendant knew, or had reason to know, of the necessity and opportunity for exercising control and supervision over its agents, servants, employees, and managers, so that third persons would not be put at risk of sustaining injury and death.

40. Defendant, having full knowledge of the noted propensities of its agents, servants, employees, and managers, negligently, carelessly, recklessly, willfully, and wantonly hired, trained, retained, and supervised them in the conduct and performance of their various employment duties on Defendant's premises.

41. As a proximate result of Defendant's negligent, careless, grossly negligent, reckless, willful, and wanton hiring, training, retention, and supervision of its agents, servants, employees, and managers, Decedent left the premises of Defendant on March 5, 2023, and proceeded to drive a motor vehicle in a dangerous and unsafe manner while extremely intoxicated.

42. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs

of himself and his beneficiaries.

43. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

44. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant as set out above, as well as its violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

WHEREFORE, having stated its factual allegations and causes of action against Defendant, the Personal Representative prays for the following:

- i. A trial by jury;
- ii. Judgment against Defendant for actual, consequential and punitive damages pled herein in an amount to be determined by the jury;
- iii. For the costs of this action; and
- iv. For such other and further relief as this court deems just and proper.

Lexington, South Carolina  
June 12, 2023

**BLAND RICHTER, LLP**  
*Attorneys for the Plaintiff*

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s/Ronald L. Richter, Jr

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s/Scott M. Mongillo

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## **EXHIBIT B**

*Portoundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased v. Jays Bar and Grill, LLC*

Civil Action Number: 2023-CP-40-03052

### **Affidavits of Non Service**

AFFIDAVIT OF NON-SERVICE

State of South Carolina

County of Richland

Common Pleas Court

Case Number: 2023-CP-40-3052

Plaintiff:

Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,

vs.

Defendant:

Jays Bar and Grill, LLC

For:

Bland Richter LLP  
105 West Main Street, Suite D  
Lexington, SC 29072

Received by Milligan & Associates LLC to be served on JAYS BAR AND GRILL LLC c/o Jay Kalin, Jr Registered Agent, 104 High Circle 8 B, Myrtle Beach, SC 29572.

I, Roger Turner, being duly sworn, depose and say that on the 13th day of June, 2023 at 12:15 pm, I:

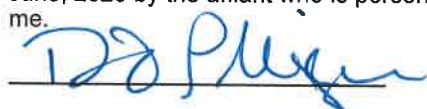
**NON-SERVED:** After due search, careful inquiry and diligent attempts I was unable to serve the **Summons and Complaint** for the reason that, RENTAL PROEPRTY OWNED BY THE DEFENDANT - WHEREABOUTS UNK PER OCCUPANT ,or information to allow further search.

I certify that I am over the age of 18, have no interest in the above action, and in good standing, in the judicial circuit in which the process was served.



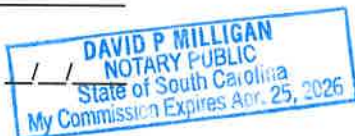
Roger Turner  
Process Server

Subscribed and Sworn to before me on the 14th day of June, 2023 by the affiant who is personally known to me.



PRINT NAME

NOTARY PUBLIC



Milligan & Associates LLC  
Process@MilliganAndAssociates.com  
P.O. Box 4845  
Florence, SC 29502-4845  
(843) 667-4747

Our Job Serial Number: DPM-2023000360  
Ref: Kimble v. Jays Bar

# STATE OF SOUTH CAROLINA

## AFFIDAVIT OF DILIGENT SEARCH

RICHLAND COUNTY

COURT OF, COMMON PLEAS

DOCKET # 2023-CP-40-3052

PORTUNDO M. KIMBLE, A PERSONAL REPRESENTATIVE OF

THE ESTATE OF DEVON ENRIQUE KIMBLE, DECEASED

-VS-

JAYS BAR AND GRILL, LLC

THE UNDERSIGNED, JEFF COSTNER, BEING DULY SWORN STATES HE ATTEMPTED SERVICE ON THE FOLLOWING DOCUMENTS : (1) SUMMONS (2) COMPLAINT (3) PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT (4) PLAINTIFF'S FIRST REQUEST FOR PRODUCTION TO DEFENDANT

IN THE FOREGOING ACTION ON : JAYS BAR AND GRILL, LLC


AFTER A DILIGENT SEARCH THIS PERSON CANNOT BE LOCATED AND THE PROCESS SERVER STATES HE HAS ATTEMPTED SERVICE ON THE FOLLOWING DATES, TIMES AND ADDRESSES.

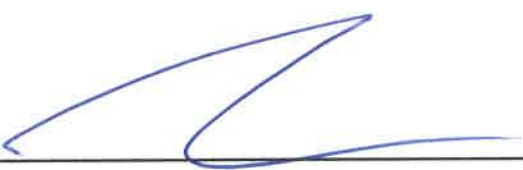
THE SERVER, JEFF COSTNER HAS MADE THE FOLLOWING ATTEMPTS TO SERVE A JAY KALIN, JR, WHO IS THE REGISTERED AGENT FOR SERVICE FOR JAYS BAR AND GRILL, LLC AT THE BUSINESS LOCATION AT, 902 GERVAIS STREET, SUITE D, COLUMBIA, SOUTH CAROLINA 29201, ON JUNE 20, 2023, AT 8:45 am, THE SERVER WAS TOLD HE WAS NOT THERE, MAY BE IN LATE THAT AFTERNOON, ATTEMPTED AGAIN ON JUNE 20, 2023 AT 4:40 pm, SERVER WAS TOLD HE IS NOT THERE, AND WAS NOT COMING IN THAT DAY, ATTEMPTED ON JUNE 21, 2023 AT 5:10 pm, THE SERVER WAS TOLD HE IS NOT THERE AND HE WAS TOLD THEY DID NOT KNOW IF HE WAS COMING IN OR NOT. ATTEMPTED ON JUNE 22, 2023 AT 5:00 pm, THE SERVER WAS TOLD HE WAS NOT THERE. THE SERVER HAS NOTICES THAT THERE IS USUALLY A BLACK PORSCHE IN THE BACK PARKING LOT ON SEVERAL OCCASIONS, WHEN ATTEMPTED AND BELIEVED TO BE THE VEHICLE THAT JAY KALIN JR DRIVES, ATTEMPTED ON JULY 05, 2023 AT 9:00 am, THE FRONT DOOR WAS OPEN AT THE RESTAURANT, THE SERVER HOLLERED SEVERAL TIMES AND WAS UNABLE TO GET ANYONE TO COME UP TO THE BAR AREA. ATTEMPTED ON JULY 06, 2023 AT 8:10 pm, A WHITE MALE AT THE FRONT GATE TOLD THE SERVER HE WAS NOT THERE, ATTEMPTED SERVICE AGAIN ON JULY 14, 2023 AT 10:00 am, THE BLACK PORSCHE WAS IN THE BACK BUT THE SERVER WAS TOLD BY A BLACK MALE HE WAS

ROA-0055

NOT IN TODAY. ATTEMPTED ON JULY 21, 2023 AT 3:30 pm, AND WAITED UNTIL 5:10 pm, A BLACK MALE CAME OUT AND TOLD THE SERVER HE WAS NOT COMING IN TODAY.


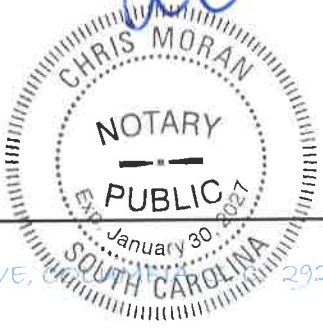
THE SERVER HAS ALSO ATTEMPTED A SECOND ADDRESS AT, 621 GADSDEN STREET, SUITE A, COLUMBIA, SOUTH CAROLINA 29201, THIS ADDRESS IS JAY'S VAPE SHOP, A WHITE MALE TOLD THE SERVER THAT HE IS USUALLY NOT AT THIS ADDRESS, JUST ONCE IN A WHILE. THE SERVER HAS LEFT A BUSINESS CARD WITH EMPLOYEES SEVERAL TIMES WITH NO RETURN CALLS. THE SERVER HAS SEARCHED FOR ANY OTHER ADDRESSES, SOCIAL MEDIA AND HAS NOT LOCATED ANYTHING BUT THE BUSINESS LOCATION.

  
\*\* JEFF COSTNER - PROCESS SERVER \*\*

  
\_\_\_\_\_

SWORN BEFORE ME THIS, 23rd DAY OF, JULY 2023

MY COMMISSION EXPIRES : 1.30.27

\_\_\_\_\_  
COSTNER'S LEGAL SERVICE, 2109 KATHLEEN DRIVE, SOUTH CAROLINA 29210

Mary-Ellen Shirley Bland Richter, LLP  
105 WEST MAIN ST. SUITE D  
LEXINGTON SC 29072

# AFFIDAVIT OF PUBLICATION



State of South Carolina  
County of Richland

Personally appeared before me the undersigned advertising clerk of the above indicated newspaper published in the city of Columbia, county and state aforesaid, who, being duly sworn, says that the advertisement of

State of South Carolina  
County of Richland  
In the Court of Common Pleas  
For the Fifth Judicial Circuit  
Civil Action Number: 2023-CP-40-03052  
  
Portourido M. Kimble as Personal Representative of the Estate of Enrique Kimble, Deceased vs. Jays Bar and Grill, LLC  
  
TO Jay Kalin, Jr., Registered Agent for Jays Bar and Grill, LLC and Jays Bar and Grill, LLC  
  
YOU ARE HEREBY SUMMONED and required to answer the Complaint in this

action, which was filed on June 12, 2023 and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service by publication hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the complaint.  
  
Eric S. Bland, Esc.  
Bland Richter, LLP  
105 West Main Street, Suite D  
Lexington, SC 29072

(copy attached)

appeared in the issues of said newspaper on the following day(s):

- 08/09/23 Wed FT
- 08/16/23 Wed FT
- 08/23/23 Wed FT

at a cost of **\$114.00**  
Account# **370315**  
Order# **2050245**  
P.O. Number:

Subscribed and sworn to before me this 23<sup>rd</sup> day of August A.D. 2023

advertising clerk



NOTARY PUBLIC, SC  
My commission expires

STATE OF SOUTH CAROLINA

Docket Number  
2023-CP-40-03052

COMMON PLEAS

COUNTY OF RICHLAND

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PORTUNDO M. KIMBLE, AS PERSONAL	)
	)
REPRESENTATIVE OF THE ESTATE OF	)
	)
DEVON ENRIQUE KIMBLE, DECEASED	)
	)
Plaintiff,	)
	)
vs.	)
	)
	)
JAY'S BAR & GRILL, LLC,	)
	)
Defendant.	)

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August 5, 2024

MOTION HEARING

B E F O R E:

The Honorable Daniel Coble, Presiding Judge.

C O U R T:

South Carolina Circuit Court 5

T R A N S C R I B E D B Y:

Barbie Teboe, Transcriber

Legal Eagle  
107 LeGrand Blvd.  
Greenville, SC 29607  
864-467-1373  
transcripts@legaleagleinc.com

A P P E A R A N C E S:

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Attorney for the Plaintiff

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P.O. Box 12129  
Columbia, South Carolina 29211

Attorney for the Defendant

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P R O C E E D I N G S

(Whereupon, the following proceedings started at 9:30 a.m.)

THE COURT: All right. Number 9 and 10, Portundo Kimble versus Jay's Bar and Grill, 2023-CP-40-3052.

MR. HOLT: Good morning, Your Honor.

THE COURT: All right. Good morning.

We've got the Damages Hearing and the Motion to Set Aside Default.

I'm happy to go through the entire Damages Hearing. I don't know if you-all talked beforehand or just -- we'll do the set-aside default and then come back to this. You-all tell me.

MR. RICHTER: Your Honor, Ronnie Richter for the plaintiff.

I saw the Court had set them both at the same time. Respectfully, I feel like we should get past the Motion for Relief From Default, and then I'd ask you to reset the Damages Hearing. But we'll do it as the Court pleases.

THE COURT: No. No. I would rather do that as well. I think it's more efficient.

What we'll do is we'll ensure that it doesn't fall through the cracks. So however I do rule, assuming we'd need to schedule it again or the appealable issue, we'll make sure that we all stay in touch and anything gets rescheduled.

But let's hear Mr. Holt's Motion to Set Aside Default

1 first.

2 And I do have -- reviewed your Memo in Support, but  
3 I'm happy to hear from you, Mr. Holt.

4 MR. RICHTER: Your Honor, I apologize. I just want to --

5 THE COURT: Yes.

6 MR. RICHTER: -- talk to the Court's attention that Mr.  
7 Tun Kimble is present for the hearing. That is Portundo  
8 Kimble. This hearing involves the death of his son, Devon  
9 Kimble. But I just wanted you to be aware that he's joining  
10 us.

11 THE COURT: Thank you.

12 Thank you for being here, Mr. Kimble, as well.

13 MR. HOLT: Thank you, Your Honor.

14 THE COURT: Yes, sir. Mr. Holt.

15 MR. HOLT: If it please the Court.

16 This -- I appreciate the Court having read -- I know we  
17 filed it on Friday. And I'm going to just touch the high  
18 points to that. And Your Honor has the memo to review it at  
19 the Court's leisure.

20 But Mr. Alphin and I represent Jay's Bar and Grill, which  
21 is the defendant in this case. And Jay's Bar and Grill is an  
22 establishment that is in Columbia, but the registered agent,  
23 who is a Mr. Jay Kalin, has an address that's listed with the  
24 Secretary of State in Myrtle Beach.

25 And so the request that we're making to set aside the

1 default is based primarily on what we contend is an  
2 improvidently granted order of publication.

3 And as Your Honor is aware, that is a largely ministerial  
4 act that the clerk of court handles. However, interestingly,  
5 if you go to the statute for what warrants an order of  
6 publication, there's actually a legal analysis that's kind of  
7 required there. So it -- that may be a hold in the process,  
8 but nevertheless it's here. And so what we've contended is  
9 that a order of publication should not have been granted.

10 In this case, the statute, which we cite at Section -- or  
11 excuse me, Section 15-9-710, sets out a course when you can  
12 have an order of publication. And there are three  
13 requirements.

14 One, is that the person you're trying to serve is in  
15 state; that is a requirement actually met here because we're  
16 dealing with a domestic corporation. But the other two prongs  
17 of that we contend are not met.

18 The first of those is that there has to have been a  
19 diligent search for the person being served to that point.  
20 And then, secondly, there has to be a -- what the statute  
21 refers to as a "cause of action" which exists against the  
22 defendant. So we would contend that both of those have to  
23 fail.

24 So we'll turn first to the diligence prong, if it pleases  
25 the Court. And our contention is that the search was not

1 diligent in this case. Registered agent is listed as Jay  
2 Kalin at an address in Myrtle Beach. And the affidavit of  
3 service suggests that there was only one attempt made to serve  
4 the registered agent as listed with the Secretary of State.  
5 And that is on file with the Court.

6       So if we're talking about diligence here, there ought to  
7 have been more than one. There was no effort, that we can  
8 tell, to serve the registered agent by certified mail or  
9 registered mail. There was no second attempt to serve the  
10 registered agent there in person. So we believe that is kind  
11 of a primary failure because when company's set out a  
12 registered agent with the Secretary of State, that is the  
13 person to whom this service ought to be directed.

14       Now, what the plaintiff did do, is they sent somebody  
15 else to go up to Columbia to the establishment itself. And  
16 they sent someone there seven times. And that sounds like  
17 diligence, just numerically. But if somebody, for instance,  
18 tries to serve me at my office, and they come to my office at  
19 8 p.m. seven times, that's not very diligent because that's  
20 not when I'm here.

21       Now, the opposite's true of Jay's Bar & Grill. Jay, of  
22 these seven attempts, only six -- excuse me, only one of those  
23 seven was even made during business hours. And that one was  
24 made prior to the busy part of those business hours.

25       So unlike a nine-to-five type business, Jay's Bar & Grill

1 operates during the evening. And so the efforts to serve  
2 somebody there all took place during the daytime before it was  
3 even open, except for this one attempt, which took place  
4 around 8 o'clock before things even get really busy. And then  
5 it was only just a little while after 8 o'clock. So we would  
6 suggest there wasn't diligence there as well.

7 And so under the diligence prong, default ought to be set  
8 aside because the order of publication was improvidently  
9 granted because it has to be a showing of diligence there.

10 But I think more importantly, Your Honor, is the fact  
11 that there's no cause of action. And this is the second prong  
12 that the statute sets out. Normally, this isn't an issue  
13 because the cases that are filed in our state often have, you  
14 know, some reasonable case or controversy. We don't have that  
15 here because what is alleged in this complaint is a first-  
16 party dram shop action. And that's the one kind of dram shop  
17 action you just can't bring.

18 Supreme Court has said that several times. You can not  
19 sue a dram shop, a bar, a restaurant, for your own  
20 intoxication, when you're the only one being injured. And  
21 that, unfortunately, is what happened here. This is a tragic  
22 loss. There's no question to that. And it never should have  
23 happened. But, unfortunately, the death of Mr. Kimble  
24 occurred -- he was in a single vehicle. And he was the one  
25 who consumed the alcohol. And now he, through his estate, is

1 trying to sue the establishment that allegedly served him that  
2 alcohol. And that's just not a cause of action that is  
3 recognized in South Carolina. And because it's not a cause of  
4 action, the order of publication should not have been granted.

5 All of that we contend go to the meritorious defense  
6 prong of the Rule 55(c), setting aside default analysis, our  
7 courts have set up in the various cases that cite in the  
8 Sundown Operating case.

9 In terms of the timing of this motion, as soon as we got  
10 wind of what was going on, Mr. Kalin submitted this to his  
11 insurance company, who hired my firm, and we immediately filed  
12 this motion.

13 And in terms of prejudice, there's not been any  
14 discovery. We're still well within the statutes of  
15 limitations period, even. We're about a year-and-a-half  
16 removed from the incident itself. And there's been no  
17 discovery at all.

18 And so, Your Honor, we believe that good cause does  
19 exist. Again, as difficult as I know this is for the family,  
20 in terms of the procedural question, it should never have been  
21 a publication of order granted when there's one attempt to  
22 serve the registered agent. And we're talking about something  
23 that's not even a cause of action.

24 So, respectfully, Your Honor, we'd ask that the Court set  
25 aside this default so we can get on with litigating this case.

1 THE COURT: All right. Thank you, Mr. Holt.

2 MR. RICHTER: And may it please the Court, Your Honor.

3 THE COURT: Yes, sir.

4 MR. RICHTER: Yeah. Again, Ronnie Richter for the  
5 plaintiff.

6 I like Ryan. He's a very good lawyer. I consider him a  
7 friend of mine. I think that argument is fully without merit.  
8 And it's misleading at best. So let me reset the scenario for  
9 you, Your Honor.

10 Devon Kimble was a patron at Jay's Bar & Grill in  
11 Columbia. He was 22 years old. They served him to the point  
12 where he had three times the legal alcohol limit. He left --  
13 tried to leave. He died in a single car accident a little  
14 after 2:00 a.m. on March 3rd, 2023.

15 We filed this lawsuit June 12th, 2023. Jay's Bar & Grill  
16 is an LLC in South Carolina. As Your Honor knows, if you're  
17 going to form an LLC, it's your obligation to designate a  
18 registered agent, and it's your obligation to keep current  
19 your address with the Secretary of State's office so that you  
20 can be found.

21 And so the address that was provided by the Secretary of  
22 State's office was 104 High Circle, 8B, Myrtle Beach, South  
23 Carolina. So we sent a process server to that address. The  
24 Affidavit of Non-Service is of record in this case. And what  
25 the server found was that this was a rental property, not

1 occupied by Jay Kalin, who is the registered agent. And so  
2 what the affidavit indicates is rental property owned -- it's  
3 a rental property owned by the defendant, but his whereabouts  
4 were unknown to the occupants.

5       Okay. So what are we to do now in our diligence to find  
6 the man who gave the address to the Secretary of State, which  
7 is not his office? Well, we sent the server to Jay's Bar &  
8 Grill. And there's an affidavit there that documents the  
9 efforts to serve Jay Kalin.

10       And, Your Honor, the only thing you can deduce from this  
11 affidavit is that the man was actively avoiding service. And  
12 I'll read -- I won't read the entire thing, but it's of record  
13 in the case.

14       "On June 20th, 2023, at 8:45 a.m., the server went there.  
15 He was told by someone" -- the establishment is open -- "that  
16 Jay was not there but he would be there late in the afternoon.

17       "Attempted again June 20th, 2023, at 4:40 p.m. Server  
18 was told he is not there and was not coming in that day.

19       "Attempted on June 21st, 2023, at 5:10 p.m. The server  
20 was told he's not there, and he was told that they did not  
21 know if he was coming in that day.

22       "Attempted on June 22nd, 2023, at 5:00 p.m. Server's  
23 told he's not there. The server has noticed that there is  
24 usually a black Porsche in the back parking lot on several  
25 occasions when service was attempted and believed it to be the

1 vehicle that Jay Kalin drives.

2 "Server returned on July 5th, 2023, 9 a.m. Front door  
3 was open at the restaurant. The server hollered several  
4 times. Was unable to get anyone to come to the bar area.

5 "Attempted July 6, 8:10 p.m. White male at the front  
6 gate told the server that Jay was not there.

7 "Attempted service again July 14th, 10:00 a.m. The black  
8 Porsche was in the back, but the server was told that Jay  
9 Kalin was not in.

10 "Attempted again July 21st, 3:30 p.m.; waited until  
11 5:10 p.m. A black male came out and told the server that Jay  
12 was not coming in today.

13 "Server also attempted a second address at 621 Gaston  
14 Street, Suite A, Columbia, South Carolina. This address is  
15 Jay's vape shop -- which is another establishment that we  
16 believe Jay Kalin owns and operates. A white male told the  
17 server that Jay is usually is not at this address, just once  
18 in a while. Server has left a business card with employees  
19 several times with no return calls. Server has searched for  
20 other address, social media, and has not located anything but  
21 the business location."

22 So that is the diligence of which is now complained, Your  
23 Honor. And to put that in some context, what we're really  
24 here to talk about is relief from default, because after that  
25 diligence that we asked for an order of publication, that we

1 got one, and that we've published notice, per the statute.

2 And really what we're talking about is Rule 55(c). We're  
3 talking about the Wham versus Shearson Lehman Brother's  
4 Factors.

5 And to read from that case, Your Honor:

6 "The standard requires a party seeking relief from entry  
7 of default to provide an explanation for the default that  
8 would give reasons why the default entry would serve the  
9 interest of justice."

10 Once a party has put forth a satisfactory explanation,  
11 then the Court may consider the Wham factors, the timing of  
12 the relief, whether the defendant has a meritorious defense,  
13 the degree of prejudice to the plaintiff. But we first have  
14 to establish the good cause. There is nothing that's been  
15 submitted to this Court to establish good cause by Jay Kalin.  
16 They try to use this alleged defect in the diligence and the  
17 order of publication as a good cause. That's the line that's  
18 smeared here just a little bit. There is no good cause.  
19 There was diligence in seeking to serve this gentleman. I  
20 think the only thing that you can deduce from the affidavits  
21 is that he was actively evading service.

22 So a valid order of publication issues -- that order  
23 issued in October of 2023. We heard nothing until a notice of  
24 appearance in March of 2024.

25 All right. So the timeliness of the request for -- they

1 don't even explain in the motion what woke him up. I mean, if  
2 it wasn't all the efforts to serve him, if it wasn't  
3 publishing in the newspaper way back in August of 2023, I  
4 mean, the submission to the Court doesn't even explain, what  
5 was the triggering event that woke him up finally to explain  
6 this long absence? A lawsuit that's filed in June, that we  
7 attempt service throughout July; that we get an order of  
8 publication on August 1; and then it's radio silence until  
9 March of 2024.

10 So, Your Honor, you're not past the good cause to even  
11 consider the Wham factors. But if you want to take a look at  
12 those factors, the timing of the motion for relief, I mean, 9  
13 months after the lawsuit was filed, 7 months after an order of  
14 publication; I don't think that bodes well for a relief from  
15 default.

16 Whether the defendant has a meritorious defense, this is  
17 the point that we're -- that counsel tried to hit in the  
18 argument about diligence and a cause of action.

19 And the case that they rely on is the Tobias case, Tobias  
20 versus Sports Club with the proposition that there is no  
21 first-party private cause of action for a dram shop. And I  
22 would say that that position is almost correct; that Tobias  
23 does clearly say that there is no first-party cause of action  
24 for an alleged violation of the statute.

25 All right. But there's multiple causes of action in our

1 complaint arising out of common law, not just the statute.

2 And so the concern that Tobias had was in a first-party  
3 setting. If it's a violation of the statute, then it's  
4 negligence per se, what do you we do with defenses like  
5 assumption of the risk and defenses like comparative  
6 negligence, at that time, contributory negligence?

7 So you can see why Tobias kind of carved that out and  
8 said, Look, if we're talking about first-party, negligence per  
9 se would kill defenses like comparative and assumption of the  
10 risk. We're not doing that.

11 All right. So to the extent that the complaint relies on  
12 those statutes, I agree. Those statutes don't create a  
13 private, first-party cause of action. There's nothing in  
14 Tobias or the cases that follow there's no common law duty  
15 whatsoever by the owner of a bar establishment to a patron who  
16 visits that establishment. So there is a cause of action.

17 And then you have to look at the degree of the prejudice  
18 to the plaintiff, would be the final factor. You could see my  
19 clients there. I can tell you every day that this continues  
20 there's an open wound for them. All right. Yeah. We -- no  
21 prejudice; we just have to do the discovery. We're talking  
22 about their son that died March 6th, 2023. Every day that  
23 they don't have closure, every day that they have to relive  
24 this is prejudicial to them. They're entitled to speedy  
25 justice here.

1           Your Honor, I don't believe any of the factors have been  
2 met to contend that we did not act diligently in trying to  
3 serve this man who evaded our process servers for over a month  
4 is ridiculous. So a valid order of publication issued.

5           And also to say, "Well, we should have tried more in  
6 Myrtle Beach." We went to the address that he provided the  
7 Secretary of State's office, as "This is where I live for  
8 purposes of service." And we encounter a tenant who says, "We  
9 don't even know where the man is."

10           So, Your Honor, I don't feel like good cause has been  
11 established. Even if you get past it, the Wham factors do not  
12 support a relief from entry of default in this case. We  
13 respectfully ask that you allow the default to stand and that  
14 you advance this to a hearing on damages.

15           THE COURT: All right. Thank you, Mr. Richter.

16           MR. HOLT: If it please the Court, a brief reply ---

17           THE COURT: Yes, sir.

18           MR. HOLT: --- Your Honor.

19           Much was said about the first prong of the statute for  
20 order of publication, about the diligence. And at the end of  
21 the day, that's a determination for Your Honor to make about  
22 whether it was diligent or not, even though the registered  
23 agent piece of this, there was only service on one occasion.  
24 But I heard very little about the second prong, which is the  
25 cause of action that must exist.

1           And respectfully to Mr. Richter, there is not any  
2 scenario under which an adult can bring a first-party claim  
3 against a dram shop for his or her own intoxication and  
4 injuries resulting therefrom. There were comments about the  
5 common law and the statute.

6           Well, our Supreme Court has recognized over and over  
7 again that we don't have a specific dram shop statute. So how  
8 do we get dram shop cases? We get them from the alcohol  
9 licensing statutes, which Mr. Richter has cited in his  
10 complaint. And then what the Tobias case has said is that  
11 those causes of action for a dram shop, which flow from the  
12 licensing statutes, they may not be used in a first-party  
13 scenario under any circumstances for an adult. They may not  
14 be used.

15           And so not matter how he's pleaded, if he is contending  
16 that there is a dram shop action against Jay's Bar & Grill for  
17 the unfortunate death of Mr. Kimble, then it cannot lie. It  
18 is not permitted. And because it's not permitted, that --  
19 there's nothing he can do under that second prong of the order  
20 of publication statute to meet that. And I think he knows  
21 that.

22           I would tell the Court, early on there was almost an  
23 agreement to set aside the default so that we could proceed  
24 with the litigation, and then we received an abrupt, "No,  
25 we're going to move forward."

1 I believe that is because of the awareness that this is  
2 not a viable claim in South Carolina. And because it's not a  
3 viable claim, it's going to be allowed to proceed in a default  
4 scenario.

5 So we'd ask the Court to set it aside, and, again, let us  
6 proceed as long as we might under the litigation in this case.

7 Thank you, Your Honor.

8 MR. RICHTER: Your Honor, I'd be happy to address why  
9 those communications fell apart, but I think it would be  
10 improper. And I -- frankly, I think it would be highly  
11 prejudicial to Mr. Holt's client.

12 Again, we're here -- this is Rule 55(c). This is relief  
13 from default. You don't get past "Go" until you establish  
14 good cause. And there is no good cause here. And the attempt  
15 to loop in the publication statute to say, "Well, there's a  
16 defect in the order of publication as kind of a proxy for good  
17 cause," I just think falls flat.

18 THE COURT: Okay.

19 And I'm going to not consider any communications between  
20 the attorneys in settlement. The only issues I'm going to  
21 consider are the ones presented by Mr. Holt and that we've  
22 heard today, as well as the arguments against -- by Mr.  
23 Richter.

24 So let me do some research, review some of these cases  
25 you-all have discussed, as well as the statutes, as well as

1 the complaint. And I'll try get something to you shortly so  
2 it could give you some direction about how this case will  
3 proceed.

4 So thank you all for being here today and to the Kimbles  
5 for being here today.

6 MR. RICHTER: Thank you, Judge.

7 MR. HOLT: Thanks, Your Honor.

8 THE COURT: Thank you.

9

10

11

(At 10:38 a.m., the hearing concluded.)

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END OF TRANSCRIPT.

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## CERTIFICATE OF TRANSCRIBER

State of South Carolina

County of Richland

I, BARBIE TEBOE, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings and evidence introduced in the trial of the captioned case, relative appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 5th day of August, 2024.

I further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 23, 2025



---

Barbie Teboe,  
Transcriber

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS  
C.A. NO. 2023-CP-40-03052

PORTUNDO M. KIMBLE  
AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF  
DEVON ENRIQUE KIMBLE, DECEASED

PLAINTIFF,

vs.

JAYS BAR AND GRILL, LLC,

DEFENDANT.

H E A R I N G  
BEFORE THE HONORABLE THOMAS W. MCGEE, III

DATE: SEPTEMBER 17, 2024  
LOCATION: SOUTH CAROLINA CIRCUIT COURT 5  
REPORTED BY: PAM GRAY

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(NONE MARKED)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 P R O C E E D I N G S

2 THE COURT: All right. Next, I believe the last one  
3 that we have for 9:30 is *Kimble versus Jay's Bar and Grill*.

4 MR. RICHTER: Afternoon, Your Honor.

5 MR. HOLT: Afternoon, Your Honor.

6 THE COURT: Afternoon. Before we start, let me get you  
7 -- get who we've got here. Who do we have here for the  
8 Plaintiff?

9 MR. RICHTER: Ronnie Richter for the Plaintiff, Your  
10 Honor. The Plaintiff, Portundo Kimble.

11 THE COURT: Okay.

12 MR. RICHTER: I know him as Tune. And he's here with  
13 his wife, Veronica, as well.

14 THE COURT: All right. Who do we have here for the  
15 Defendant?

16 MR. HOLT: I'm Ryan Holt for the Defendant. And I'm  
17 joined by John Alphin, and also on behalf of my client,  
18 Jay's, we've got Haswan Rivers with us, as well.

19 THE COURT: Okay.

20 MR. HOLT: Your Honor, just a quick logistical question.  
21 This is our final judgment hearing, and so I wonder, could --  
22 could we ask The Court, is it as simple as just clicking the  
23 record button on your end since we don't have a court  
24 reporter?

25 THE COURT: It's all -- yes. It's -- these are always

1 recorded.

2 MR. HOLT: Thank you.

3 THE COURT: Sure. All right. Mr. Alphin, good -- good  
4 to see you, sir.

5 MR. ALPHIN: Good morning, Your Honor.

6 THE COURT: So -- so in reviewing -- in reviewing the  
7 file on -- on this matter, it looks like that there was a  
8 default, a motion for relief from default, and then that --  
9 that was denied. And -- and so now we've got the motion --  
10 the damages hearing. Do I have that right?

11 MR. RICHTER: Your Honor, there was also a motion to  
12 reconsider the denial of the relief from default. And that  
13 motion to reconsider was likewise denied.

14 THE COURT: Yes, sir. I see that order dated  
15 September 3, 2024, by Judge Coble.

16 MR. RICHTER: Yes, sir.

17 THE COURT: All right. So is there anything that we  
18 need to address before we -- I turn it over to Mr. Richter?

19 MR. HOLT: Your Honor, I do have some argument to make.  
20 I can do that at closing after he finishes with his  
21 witnesses. But I'll do it whenever The Court would prefer.

22 THE COURT: Okay. And it's my understanding that --  
23 since the default has been entered and upheld, that -- that  
24 you certainly -- you and your clients are -- certainly can  
25 participate to the extent that it goes toward the damages

1 issue, but not anything for a liability issue. Is that -- is  
2 that accurate?

3 MR. HOLT: That's our understanding, as well, Your  
4 Honor.

5 THE COURT: Okay. Mr. Richter, happy to hear from you,  
6 sir.

7 MR. RICHTER: Yes, sir, Your Honor. May it please The  
8 Court. As this is default, if the facts played in the  
9 complaint are established now. It is a fact that on March 5,  
10 2023, Devon Kimble was a patron at Jay's Bar and Grill, where  
11 he was over-served to the point of visible intoxication,  
12 where he was permitted to leave, and where he subsequently  
13 died in the single-car accident.

14 He was 22 years of age. We're here today, Your Honor,  
15 to take testimony with regards to grief, sorrow, and mourning  
16 that has precipitated this tragic loss. And we'll offer  
17 testimony from his parents. First from Portundo Kimble, and  
18 again I'll refer to him as Tune. So if I could call Mr.  
19 Portundo, Tune, Kimball as a witness, please.

20 THE COURT: Yes, sir. If you could, please raise your  
21 right hand for me. Do you swear to tell the truth, the whole  
22 truth, and nothing but the truth, so help you God?

23 MR. KIMBLE: I do.

24 THE COURT: All right. Thank you, sir.

25 DIRECT EXAMINATION

1 BY MR. RICHTER:

2 Q. All right. Tune, let's just start with some general  
3 background now. Please introduce yourself to The Court, your  
4 full name.

5 A. My name is Portundo Kimble. I'm Devon Kimble's father.

6 Q. And how old are you, sir?

7 A. I am 58 years old.

8 Q. Okay. Likewise. So where were you born, Tune?

9 A. I was born right here in Columbia, South Carolina.

10 Q. And if you could just tell The Court your educational  
11 background. Where did you go to high school and any -- any  
12 education post high school?

13 A. I went to Columbia High School. Directly after high school,  
14 instead of college, I went to finishing school. After that,  
15 I decided to go to work. I decided not to just stay in the  
16 workforce with Apple South. I decided to go and get my real  
17 estate license, and my builder's license, and renovations  
18 license so that I can renovate, remodel, and design homes.  
19 That's what my wife and I are doing presently. We're both  
20 employed -- self-employed. We are active real estate agents  
21 with Fort Jackson Realty. And we own and operate both of our  
22 renovations companies.

23 Q. Tell me your wife's name.

24 A. My wife's name is Veronica Kimble.

25 Q. And where did you guys meet?

1 A. We met at an Applebee's about 29 years ago.

2 Q. Okay. All right. And so you guys been married for how long  
3 now?

4 A. Eighteen ---

5 MS. KIMBLE: We got married in 2008. September 22 was  
6 our wedding anniversary. And I haven't -- I can't even  
7 think how long we've been married. To be honest with you,  
8 it's just ---

9 BY MR. RICHTER:

10 Q. I don't know why you let Tune off the hook on that one. But  
11 you had a phone a friend on that one, Tune. Okay. Let's  
12 talk about your family. Tell me about your kids, their --  
13 their names and ages.

14 A. Devon, of course, was 22 at the time of the accident. He was  
15 20 days before he had the accident. He was our first son.  
16 He lived with us at the time of the accident. He was living  
17 on USC with friends, and we decided that it was time for him  
18 to purchase a home. So he was working with me, and he had a  
19 nighttime job, as well. He decided to earn extra money for  
20 his down-payment and buy furniture for his first home. And  
21 he was doing just that at the time of his demise.

22 Q. He's got two brothers?

23 A. He's got two brothers. He's got Dylan Kimble. He is 19.  
24 Just turned 19 a couple of days ago. He's at The Citadel,  
25 the Charleston military college, right now. In honor of his

1 brother, he decided to take the road less traveled and to go  
2 the hard route to make his brother proud. And we're -- we're  
3 extremely proud of his decision because he could have wound  
4 up at Charleston College or University of South Carolina, is  
5 where he really wanted to go, but he decided, you know, the  
6 Citadel was where he needed to be.

7 Q. All right. And then your youngest son, how old is he?

8 A. Our youngest boy? He's nine years old. His name is Dalton.  
9 He's -- he's a little firecracker. He's just like identical.  
10 He could be his twin, you know, just reincarnated. He's at  
11 the Round Top Elementary School as we speak here in  
12 Blythewood, South Carolina. He's a boy scout. He has his  
13 boy scout meeting tonight. All three of my sons were in the  
14 scouting program. My son that's at The Citadel just got his  
15 eagle. Devon missed out on his eagle by aging out. He did  
16 not complete his program before he turned 18. But they're  
17 all avid scouters, and they spent a lot of time in the woods  
18 with their dad. I'm their leader, one of the leaders, of  
19 Troop 224 in Blythewood, South Carolina. So we spent a lot  
20 of time together. We had a tight-knit family. And we still  
21 do. If you saw one, you -- most of the time you saw the  
22 other, especially when it came time to ride the four-  
23 wheelers, or go out into the woods and do some family time.

24 Q. And tell me -- tell me about Devon and his brothers.

25 How did -- how did his brothers view him?

1 A. He was their brothers' keeper. Devon kept track of his boys  
2 -- his boys. He called them his brothers. He felt like he  
3 had to be their mentor, since he was the older brother he --  
4 he taught them, mentored them. I was just looking at  
5 pictures last night when he awarded my middle son with his  
6 arrow of light moving up into the boy scouts from the  
7 Webelos. So he was there, you know, to help graduate these  
8 kids up through the scouting program, as well, and my wife  
9 and I, as well.

10 But he loved his brothers. Many pictures of them  
11 together. I didn't realize how many trips we've been on  
12 where they were just all over each other. Or you catch them  
13 on the sofa watching a movie, and they fall asleep watching  
14 the football game. Or you know, huddled up on his bed  
15 playing video games. But they were inseparable, unless Devon  
16 was out with some of his football buddies. But they spent a  
17 lot of time together. They respected each other, and the  
18 love between them was immeasurable.

19 MR. RICHTER: Your Honor, if you would permit me to  
20 share the screen. I have a couple photographs I'd like this  
21 show The Court.

22 THE COURT: Yes, sir.

23 MR. RICHTER: I -- I -- can you -- I think I'm sharing a  
24 picture with you. Can you see that?

25 THE COURT: Yes. Snowboard?

1 Q. Tell us about this picture, Tune. What do we see here?

2 A. We -- every winter with our scouting program, we take the  
3 boys skiing, snow skiing, snowboarding. Every season was a  
4 different event. Like this weekend, we're taking the Cub  
5 Scouts to Sesquicentennial State Park. But right now, the  
6 picture we're looking at is when he was probably about ten, I  
7 think, in the scouting program when we took him to  
8 Winterplace to learn how to snowboard. And that picture was  
9 captured.

10 Q. Was he a pretty good athlete?

11 A. Yes. Yes, he was.

12 Q. Let me go back a little further and share this one. How old  
13 is Devon here?

14 A. That's his first birthday.

15 MS. KIMBLE: That's his first birthday. They gave him a  
16 personal cake. He was getting ready to eat it. Look at that  
17 face.

18 BY MR. RICHTER:

19 Q. Beautiful boy. Baseball -- did he like baseball?

20 A. Yes. Yes. We tried his hand at baseball. He played two or  
21 three years, but football was his passion. So after about  
22 three years of playing little league baseball, he decided to  
23 switch over to play football. But he attacked it with  
24 passion, and he said it wasn't his love. Football was his  
25 love. So after three years, against my best wishes, he

1 decided to go the football route, which is okay with me.

2 Q. Got a picture of that for you, as well. This is him playing  
3 for Blythewood High School?

4 A. Yes, sir.

5 Q. This was his passion? It was -- was he pretty good at it?

6 A. He was really good until he tore his ACL. He tore his ACL,  
7 and he sat on sideline a few games. But after that, you  
8 know, he got back at it. You never -- you never as strong as  
9 you were once you make that tear and even after surgery. But  
10 he always gave it his best.

11 Q. I'll leave the show up for now and just ask you some more  
12 questions. I'll come back to some more photos in a minute.  
13 So my son is 22 years old. I found the teen years a little  
14 -- little dodgy. You know, how was Devon as a teen?

15 A. Devon was a very inspire-able teen. He inspired everyone  
16 around him to join whatever he was doing, if it was football,  
17 if it was basketball, or if it was just camping or fishing.  
18 Many fishing trips we found out that there were quite a few  
19 of his buddies that were coming onto the boat with us that I  
20 didn't know were coming because Devon was going and he  
21 inspired them to come, as well. He wanted to teach them as a  
22 teenager.

23 I got him a little car if he needed to drive, and all  
24 teenagers do. The only -- only requirement in my house is  
25 that you learn to drive a five speed if you're going to

1 drive. Every man should know how to drive a five speed. So  
2 I got a little five speed. And I didn't know that he was  
3 teaching most of the kids at school to drive his five speed  
4 and they're like, wow, you know. So I got a lot of those  
5 stories that came from his friends that some of the best  
6 memories of him was, you know, him teaching them how to drive  
7 that little five speed car.

8 But as a teen, he loved the outdoors. He loved to skeet  
9 shoot. We'd go skeet shooting a lot. Of course, we get to  
10 mountains, we'd snow ski a good bit, but he loved the  
11 beaches. Couldn't keep him out of the water. We have a pool  
12 here at the house. And I think, yeah, he was a bit of a  
13 ladies' man. We couldn't keep the girls away from the house.

14 Q. I can see that.

15 A. Yeah, he just -- they just flocked to him 2, 3, 4 at a time.  
16 And I'm like, okay, which one are you dating? He's like, I'm  
17 not dating any of them. We're just all going out as a group.  
18 But he -- he was very inspire-able, and he made the lasting  
19 impression on me.

20 Q. Did he have -- did he have a special love at any point? Did  
21 he have his first love?

22 A. Yeah. His mom was his first love.

23 MS. KIMBLE: But besides me, he had a girlfriend, a  
24 long-term girlfriend for six years.

25 BY MR. RICHTER:

1 Q. Yeah. Yeah. Tell me about -- I'm gonna share this picture.  
2 Tell me about Devon as a young man, his hopes, dreams,  
3 aspirations. How old is he here in this picture?

4 A. He's 21, 22 somewhere in there. I think maybe 21.

5 MS. KIMBLE: Twenty-one. That was 2019. Like the end  
6 of 2019. We had just got him his car.

7 BY MR. RICHTER:

8 A. Yeah. He had his eyes set on a Camaro. And, you know, he  
9 did good. He was following our direction, and ---

10 MS. KIMBLE: He was getting into the real estate jobs,  
11 and he was doing really good. So we figured it would be a  
12 good idea to grant him his gift.

13 BY MR. RICHTER:

14 Q. Yeah. So he was working with you guys?

15 MS. KIMBLE: He was. At this point, he was working at  
16 the dealership. He was a -- a -- what do you call them,  
17 consultant?

18 A. Yeah. He was a consultant at the car dealership. Chevy?  
19 Was it (indiscernible)?

20 MS. KIMBLE: And he worked with us on the weekends.

21 BY MR. RICHTER:

22 A. Yeah. He would go out and show houses with his mother. And  
23 if he wasn't with her, he was out in the real estate industry  
24 with me on construction sites, looking at new construction,  
25 how to reconstruct. Because he wanted to run our company

1 businesses once he finished his education.

2 BY MR. RICHTER:

3 Q. Was he a good son?

4 A. Best. Yeah.

5 MS. KIMBLE: He wasn't perfect, but he was perfect to  
6 us.

7 BY MR. RICHTER:

8 Q. All right. Let's talk about phone call. So who got a phone  
9 call?

10 A. I got the phone call a little after 3:00 in the morning.  
11 Probably about 4:00 in the morning?

12 MS. KIMBLE: 4:40.

13 BY MR. RICHTER:

14 Q. About 4:40, my wife says. Woke us up.

15 MR. HOLT: Objection, Your Honor. I'm sorry. Obviously  
16 there's no jury, but I still think the rules of evidence  
17 apply and hearsay is not proper whatever somebody else said.

18 MR. RICHTER: Your Honor, it's not hearsay. It's not  
19 being offered for the truth and matter, sir. It's being  
20 offered to demonstrate the grief and sorrow. That this is  
21 the soundtrack that lives in their heads forever. It doesn't  
22 matter who said what, but this is what they're forced to  
23 replay over and over and over again. So this does not go to  
24 the truth. This goes to the grief.

25 THE COURT: Objection overruled.

1 BY MR. RICHTER:

2 Q. So tell me about that phone call. Who's -- who's -- who told  
3 you what happened to Devon?

4 A. My sister called me 4:40 in the morning, as my wife says, and  
5 I took the call. And she said that her son -- my son's  
6 cousin ---

7 MR. HOLT: I'm sorry. Objection renewed. I'm sorry.

8 THE COURT: Overruled. Please continue.

9 BY MR. RICHTER:

10 Q. What did she tell you?

11 A. She told me that her son informed her that he believed that  
12 Devon was in an accident. And of course we were able to  
13 track his phone by location. And of course, we have the  
14 little one at the house, so I figured maybe he just needed a  
15 ride home if he wrecked his car. So his mother and my middle  
16 son got in the car to go to the crash site where he was.  
17 Only to find out that he had passed on the scene.

18 MR. RICHTER: And when you got to the scene, was he  
19 still there?

20 MS. KIMBLE: When I got to the scene, there was police  
21 presence everywhere. They had the block (indiscernible), and  
22 there was a police officer standing there, and my son was  
23 driving because I was just a wreck. Just -- I could not even  
24 -- I couldn't drive. So my son was driving, and then I got  
25 out of the car, and I went to the police officer.

1           And I said, I think this is my son. I think because we  
2           had his location. And the police officer said, ma'am, go  
3           back to the car. There's someone coming by to talk to you.  
4           And it seemed like forever. But the coroner had his last  
5           location, because he, at one point was living downtown. But  
6           he moved back in because he was trying to save money, so he  
7           could close on his house. So his -- and he said I'm not  
8           going to change my address until I close. Because he was  
9           going to close -- actually, that Friday was his closing day,  
10          and they moved it a week.

11          So he -- they had went to his last known address. And  
12          then the -- the police officer finally came to me, and he  
13          just blurted it out. And my son was gone, and now I don't  
14          remember nothing after that.

15        BY MR. RICHTER:

16        Q.    I'm going to show you the car.

17               MR. RICHTER: Veronica, I don't think you've seen the  
18               car.

19        BY MR. RICHTER:

20        A.    No. And I don't want her to either.

21               MR. RICHTER: All right. Please look away.

22               MS. KIMBLE: Okay. I'll turn away.

23        BY MR. RICHTER:

24        Q.    Tune, is this the condition the car was in after the wreck?

25        A.    Yes.

1 Q. I'll show you one -- one more image. And so where was the  
2 car? Where did you find the car?

3 A. They towed it to the salvage yard. And that's where those  
4 pictures were taken.

5 Q. Where was the location of the accident?

6 A. It was on 277.

7 Q. Leaving downtown?

8 A. Leaving downtown Columbia, heading to Blythewood. He was  
9 coming home. He was -- he was coming home. He was leaving  
10 downtown.

11 MR. RICHTER: All right. Veronica, I took that picture  
12 away. Okay. So where did you go from there? Did you go to  
13 the hospital? Do you go to the ---

14 MS. KIMBLE: They told me to come home that there was  
15 nothing. And for hours, we were not believing it. Could not  
16 believe it. Nobody called us. Nobody notified us. It was  
17 just here the same my husband called the hospital. Nobody  
18 could find anything. I ended up calling his girlfriend. And  
19 please help me. My son's with you. Please tell me my -- my  
20 son's car was stolen and it was not him. And you know ---

21 BY MR. RICHTER:

22 A. It just didn't seem real. We're -- I guess we're in shock.

23 MS. KIMBLE: He was actually -- he had worked with my  
24 husband. It's a Saturday, so he didn't work that Saturday.  
25 He went to work that night. He would -- he was valeting cars

1 downtown. And I spoke to him. I called him, and I swear  
2 that day, he did not want to let me off the phone. He was  
3 like -- if only I knew that was the last conversation I would  
4 have with my baby.

5 BY MR. RICHTER:

6 Q. So who had to tell the boys?

7 A. I believe I did. Of course, my middle son knew because he  
8 was at the car site with my wife. He drove her. But the  
9 next morning ---

10 MS. KIMBLE: No that night -- that day, I guess I came  
11 home and I was just hysterical. And I don't remember after  
12 that. I just remember two months later, waking up from this  
13 hell I was in, thinking it was just me that lost him. And  
14 then I realized it wasn't just me. And my husband also lost  
15 him, and my children lost a brother.

16 BY MR. RICHTER:

17 Q. And so I assume you had to tell the broader family too, your  
18 -- your siblings, his cousins, you know. Who had to spread  
19 that news?

20 A. I made -- I started making phone calls once it sunk in that  
21 he wasn't coming home because we were just hoping that the  
22 car was stolen and that it wasn't him. So -- so I started  
23 making phone calls to our immediate family, and the job, we  
24 started filling up with everybody, not only family members,  
25 but a lot of friends.

1           We had probably 25 of our relatives drop what they were  
2           doing and got on planes and came in just to help me out,  
3           because my wife had completely checked out. As she mentioned  
4           about two months later, is when she really came to. And  
5           we're still going through it today. I just don't know how  
6           we're getting through it, but every day is a little better.

7           But my sons, the two that are with us now, the one at  
8           The Citadel and my little one, they are -- they are not where  
9           they should be mentally because of it. They lost their big  
10          brother, their mentor. My little one cries himself to sleep  
11          on occasion. So we have to deal with that. We get phone  
12          calls from the school where we have to go pick him up because  
13          he'll think of something that reminds him of his brother and  
14          -- and the rest of the day is gone for him.

15          My son at the Citadel has called us and told us that he  
16          has to see the counselor there at The Citadel, because some  
17          days it's just too much for him to bear when he thinks about  
18          it.

19          MS. KIMBLE: So I want to share, I think the reason why  
20          -- one of the reasons why our son, Dylan, chose to go to the  
21          Citadel because on the acceptance letter from the Citadel was  
22          our son's, Devon's, birthday and he said, Mom, I think it's a  
23          sign that I should go there. This is what Devon wants me to  
24          do, and I'm going to do it.

25        BY MR. RICHTER:

1 A. Yeah. It's a hard choice, but he's making it through today.

2 Q. You guys had to bury your son. Tell us about that  
3 experience. I'm sorry.

4 A. Oh. Yeah, the planning. I guess I've never had to do  
5 something so intimate with such an extreme case. So it was  
6 very tough for me. Thank God we had a lot of family and  
7 friends to help us through it. And they're still getting us  
8 through it. But making those phone calls to the funeral home  
9 and having to go and get clothing and suits and things for  
10 him to be viewed and talk to the funeral director, it just  
11 felt like we're being gutted. And it still feels like our  
12 family's been gutted. It'll never be the same.

13 Q. Who gave -- who gave the eulogy for your son?

14 A. I did. I felt like I needed to in his honor, because I knew  
15 him better than anyone else. He was -- he was my right-hand  
16 guy here at the home, and on the jobsite, and at the real  
17 estate office. Whenever he came in, when I saw him walk in,  
18 you know, usually it's just okay, I forget about whatever  
19 client I had to see.

20 But making those plans was probably the hardest thing  
21 I've ever had to do next to actually putting him to rest.  
22 But the day of the funeral, we had to have busses and  
23 shuttles. There was over 600 people at the viewing the night  
24 before, and a little over 500 at the funeral. The church was  
25 packed, and we just had to -- we just had to pack them in. I

1 didn't realize that he had touched so many people.

2 But it seemed like everyone that he'd come in contact  
3 with wanted to be his friend, or wanted to be him, and the  
4 girls wanted to be with him it seemed. So big following, you  
5 know, in the Boy Scout community, because he came up through  
6 Troop 224 here in Columbia. So 12 years of that program, and  
7 all his football coaches and teachers and the mayor --  
8 actually had the mayor's son in my scout troop. So a lot of  
9 the mayors and congressmen here in town came and paid their  
10 respects. The fire chief was one of my boys -- his son, and  
11 the police chief was one of my boy scouts, as well.

12 So we had a large presence there, but there was a lot of  
13 people, and it just -- it just felt like I just couldn't  
14 believe that they were there for that reason. You know, I  
15 still don't believe that we're having to go through this.  
16 You know, it feels like a nightmare, and I can't -- can't  
17 close the door on it.

18 Q. Tune, what -- what was that moment like after the funeral and  
19 the crowds had gone, and you had to go back home, and it was  
20 quiet for the first time. What does that feel like?

21 A. It was about a month after, because we had quite a few of our  
22 family members that just took three, four weeks off work.  
23 Dropped everything because I couldn't do it on my own. I  
24 still have two boys here at the house, and my wife had  
25 completely checked out. We had to medicate her. I tried to

1 show up on some of the jobsites, but I just wound up coming  
2 back home.

3 So I just needed people here to take care of my family  
4 and to help me through it. But after they left and went home  
5 and got back to their lives, the numbing feeling, it's like  
6 we all had to learn to breathe again. It's -- I don't wish  
7 this on anyone. I never thought I'd have to bury a son or  
8 anybody's son. You know, we're not supposed to bury our  
9 children. I was -- I just -- I just laid my mom to rest two  
10 months earlier. So we're still grieving her when we got that  
11 phone call. So it's just been -- it's been one -- one hell  
12 of a year this past year.

13 Q. Tune, I want to -- I want to talk about Devon's cousin for a  
14 second.

15 A. Okay.

16 Q. He'd been out that night with his cousin, right?

17 A. Yes, Devon's cousin joined the Air Force about seven years  
18 ago, and he spent every summer with us.

19 Q. And what's his name?

20 A. His name was Quazay. And he'd rather be here at my house  
21 with my three boys than at home with his mother. So when  
22 he'd get a furlough and come home from the Air Force, he'd  
23 come here. Yeah, first stop was always here. He'd unpack  
24 his bags and, okay, where am I sleeping? And they -- and  
25 then the gathering was on, you know.

1 MS. KIMBLE: So they hadn't seen each other in three  
2 years, and Quazay came into town. Devon was preparing to  
3 close on his house. He was working long hours, working a lot  
4 of hours just to make ends meet, to close on his home, on his  
5 new place.

6 BY MR. RICHTER:

7 A. We could have helped him with a lot of that, but I felt like  
8 him being a young man, he needed to take a little home  
9 ownership and earn the money himself. But if he came up  
10 short, we would have had his back.

11 MS. KIMBLE: I mean, I was going to give him the  
12 commission for his -- for the remaining balance, but I -- we  
13 really instilled in him that it was very important for him to  
14 put some sweat equity into this.

15 BY MR. RICHTER:

16 A. Yeah. So when Quazay got here, he wanted to know where his  
17 cousin was. And we told him that he was at work. He wanted  
18 to know where he was. So as soon as he could, he got in the  
19 car and went and found him, and waited for him to get off  
20 work, and they went out. It was first day of spring break,  
21 of course, so Five Points was packed. The bars were full,  
22 and all their friends were out there. So they were being --  
23 they were being young men. They were enjoying life.

24 MS. KIMBLE: There was a fight. There was a wrestling  
25 match or something.

1 BY MR. RICHTER:

2 A. I don't -- I don't know, but that evening that it happened,  
3 they were together. They spent the wee hours in the morning  
4 together, and they both got into their separate cars, and  
5 Devon never made it home.

6 Q. Did Quazay feel guilt that he didn't protect his brother?

7 MR. HOLT: Objection, Your Honor, as to what somebody  
8 else feels.

9 BY MR. RICHTER:

10 Q. Did Quazay expressed to you that he felt guilt that he did  
11 not protect Devon that night?

12 A. He did. He did overwhelmingly. He couldn't get it together.  
13 And we expressed to him that he really needed to honor Devon  
14 and continue on and go back and continue his military service  
15 and Air Force and serve our country. And we had a feeling  
16 that he needed to seek counsel, and I was hoping he did. And  
17 he just wouldn't let the grief go. He felt like he could  
18 have done more to ---

19 Q. What happened to Quazay?

20 A. Well, he felt like he could have done more to keep the keys  
21 -- Devon's keys out of his hands and not let him drive that  
22 night. So the guilt was overbearing. And of course, Quazay  
23 felt like another son of mine. So last month, a month ago,  
24 he -- the guilt just got the best of him, and he committed  
25 suicide.

1 MR. HOLT: Respectfully, objection, Your Honor, as to  
2 relevance of his cousin.

3 THE COURT: Overruled.

4 BY MR. RICHTER:

5 A. He committed suicide a month ago.

6 Q. Is this Quazay?

7 A. Yes. That's my -- that's my fourth son, and now he's gone,  
8 as well.

9 Q. So you -- you feel like this -- this accident has taken this  
10 from you, as well?

11 MR. HOLT: Objection, Your Honor.

12 BY MR. RICHTER:

13 A. Yes.

14 THE COURT: All right. Let's -- let's move on.

15 BY MR. RICHTER:

16 Q. Have you been able to share with your sons that Quazay has  
17 passed?

18 A. I can't. My wife and I have had many discussions on how to  
19 handle this, and I can't -- we can't bear -- even a month  
20 since he's -- he passed, we still can't -- can't tell our  
21 boys that he's gone. I don't know how to tell my other two  
22 boys that another one of their brothers is gone. So we had  
23 to have the service without them knowing that. They -- they  
24 still don't know, and I don't know how or when I'm going to  
25 tell them.

1 I'm thinking maybe Christmas break so I could make sure  
2 I've got good therapy for them. Because I -- I just can't,  
3 because I know that my son at The Citadel was going to lose  
4 it. He's going to check out, and I don't want that for him.  
5 So we haven't told my -- my sons yet, and honestly, I don't  
6 know if I can. I may have to have somebody else do it.

7 Q. All right. Tune, I do want to wrap this up. Tell The Court  
8 what it is that you would want the world to know about Devon  
9 that we're never going to be able to learn.

10 A. Devon was his brother's keeper. He loved his brothers, all  
11 three of them. Quazay was like his brother. And he was a  
12 protector of them, and a good young man, had a great career  
13 ahead of him. He was going to take over his mom's real  
14 estate business, and he was going to hopefully run my  
15 construction company. But most of all, he was our son.

16 MS. KIMBLE: I miss everything about him.

17 BY MR. RICHTER:

18 A. I know that he was going to be every bit of a man that I  
19 needed him to be to raise my grandkids, and that's why I was  
20 pushing them to get their eagle scout and pushing them to get  
21 education, and pushing them to be the man that I know that  
22 they are because of where they come from.

23 And I was looking forward to meeting my grandkids from  
24 him, because I knew they were going to be beautiful, those  
25 big blue eyes of his. But he was just -- he was -- he drew a

1 crowd wherever he went, and everybody that knew him knew of  
2 him, because if his eyes didn't get you, that smile would  
3 just floor you. But we'll never see his kids. We'll never  
4 see his kids, unfortunately.

5 MR. RICHTER: Veronica, you've been chiming in from time  
6 to time. Is there anything that you want to add? Anything  
7 you want to say about how this has impacted you?

8 MS. KIMBLE: It's impacted me more than I could even  
9 begin to think. I am -- I've been selling real estate for 20  
10 years. I was getting ready to open my -- my own real estate  
11 company, and I just can't even bear to leave the house, get  
12 behind the wheel. My husband has pushed me any kind of way  
13 to get behind the wheel. I can't even begin to drive close  
14 to downtown. My kids -- I just -- I know they need me, and I  
15 know I need to get my stuff together, my -- my emotions  
16 together, to be a better mom for them, to be there for them,  
17 and to be a better wife. And it's just -- I don't know how.

18 BY MR. RICHTER:

19 A. Veronica was presented and honored at Fort Jackson Realty for  
20 the top selling agent for 2021 and '22. Because -- and  
21 because of that, her income status was great for our family.  
22 But we don't have that anymore because a realtor has to  
23 drive. They got to show properties. And I even bought her a  
24 new car so that hopefully she would want to drive it, but we  
25 wind up chauffeuring her most of the time.

1 I just need -- I just need my family back. I need my  
2 wife back. I need -- I need help with my boys, and she's my  
3 partner. I need her. I need her back. But one day at a  
4 time. One day at a time, we're going to get there. We're  
5 going to -- we'll eventually get there.

6 MS. KIMBLE: Never. It's never going to be the same  
7 without him.

8 MR. RICHTER: I think that's enough, Your Honor. I  
9 think you get the point. I would -- I would tell The Court  
10 that I'm not aware of evidence of conscious pain and  
11 suffering. So this is not to involve the survival claim.  
12 This is pure wrongful death. This is pure grief, sorrow, and  
13 mourning.

14 These are Devon Kimble's legal heirs. Your Honor, I  
15 could offer you more, but, again, I think you have the point.  
16 I will make a request in terms of damages. I don't know if  
17 Mr. Holt intends to ask questions at this point or not.

18 THE COURT: Do -- is there something that you want to --  
19 to let me know about the request on behalf of your clients,  
20 or do you want me to afford Mr. Holt, Mr. Alphin, the right  
21 first? You tell me, Mr. Richter.

22 MR. RICHTER: I'll go ahead make the ask now, Your  
23 Honor. I would ask The Court for an award of damages, actual  
24 damages in the amount of \$5 million. I would ask The Court  
25 for an award of punitive damages in the amount of \$5 million,

1 for one-to-one ratio. Your Honor, there is no market value  
2 here. There is no price that we could put on this life.

3 When you just search anecdotally for DUI fatality  
4 settlements, I mean, I -- I see numbers ranging from 4  
5 million, 5.5 million, 9.8 million. I believe the Folly Beach  
6 bride might have been 20 million. I'm aware of a \$33 million  
7 settlement in a case of this nature. Again, I don't think  
8 there's a market value. As far as the punitives are  
9 concerned, because there was no discovery in the case --  
10 there's -- you've asked this question of an earlier panelist,  
11 there is no evidence of the ability to pay. That's just one  
12 factor. I think the factors that control here are those  
13 factors that go to the egregiousness of the conduct of the  
14 need for a deterrence.

15 South Carolina is sixth in the nation in DUI fatalities,  
16 6.02 per 100,000 population makes us number six in the  
17 country. I don't know how many times we have to go through  
18 this. I don't know how many times we have to watch this on  
19 the news. I don't know how many times we need to send the  
20 message, but apparently we have to keep sending it until it's  
21 heard. Until conduct is curbed. Until rules are followed,  
22 so that we don't have another Devon Kimble.

23 So, Your Honor, I think an appropriate award of actual  
24 damages here is \$5 million. I could ask for more. I think  
25 an appropriate war to candidate damages. Here is \$5 million

1 and we ask you to enter judgment in those sums.

2 THE COURT: Thank you, Mr. Richter. Mr. Holt,  
3 Mr. Alphin, do you have any questions of either of the  
4 Kimbles?

5 MR. HOLT: I do, Your Honor. If it pleases The Court.

6 CROSS-EXAMINATION

7 BY MR. HOLT:

8 Q. Mr. Kimble, I just have a couple of cross-examination  
9 questions. And know that we're very sorry for your loss.  
10 And there's obviously nothing that we could say or no amount  
11 of money that is going to make you whole. And we understand  
12 that. You mentioned something about where your son was  
13 living at the time of his death. Was he still -- you said he  
14 stayed with you, but he also stayed with friends on campus.  
15 Can you make that a little clearer for me, please?

16 A. He moved out a year prior because he wanted some  
17 independence. And we allotted him that and helped him get  
18 furniture, because he had some roommates. Like most college  
19 kids, he had roommates down there at USC, and he came to us  
20 and said, hey, you know, the roommate thing is great, but I  
21 think I need -- I need my own place. So we found him a  
22 house. And we signed the contract, got the bid accepted, so  
23 he moved back in.

24 After careful consideration, he moved back in with us,  
25 and we made sure that a wing of the house was prepared for

1 him so that he could have his privacy. So he could have his  
2 friends over without disturbing his mother and I. And he was  
3 with us because we wanted him to save his money for a down  
4 payment, closing cost, because I wanted him to be able to do  
5 it on his own. And he was up to it. And he was willing, and  
6 he took on the challenge. He said, okay. He was willing to  
7 do it. So he moved in with us, and I'm so happy.

8 I'm so thankful that he made the decision to move back  
9 in with us, because it gave us that much more time with him,  
10 not knowing that this tragic event was going to unfold.

11 Q. And I know the answer this question, but I just have to ask  
12 you for the record. Did Devon have any children of his own?

13 A. No, Devon has no children.

14 Q. Those are all the questions I have, Your Honor. I do have  
15 some arguments to make to The Court at the appropriate time.

16 THE COURT: All right. Mr. Alphin, anything?

17 MR. ALPHIN: Nothing, Your Honor.

18 THE COURT: Mr. Holt, do you have anything else to  
19 present?

20 MR. HOLT: Your Honor, our arguments are legal in  
21 nature. We have no factual evidence to present on the issue  
22 of damages.

23 THE COURT: Happy to hear from you.

24 MR. HOLT: Your Honor, thank you again. If it pleases  
25 The Court.

1 THE COURT: Yes, sir.

2 MR. HOLT: As Your Honor is aware, usually the way a  
3 case like this comes before The Court is that a matter with a  
4 viable cause of action is filed and then it is served upon a  
5 defendant, and then the defendant fails to answer. And so as  
6 the default cases that our Court of Appeals and Supreme Court  
7 have heard -- have addressed over the years, is that the  
8 issue at a default damages hearing must be totally related to  
9 damages. Liability is determined.

10 We would submit to The Court that this is a unique case  
11 in that what I'm about to say only goes to the issue of  
12 damages. I need not mention liability. And what I'm about  
13 to say because South Carolina has simply not recognized the  
14 cause of action that is pled in this complaint. This is not  
15 a situation where a recognized cause of action has been pled,  
16 so liability is determined, and so there flows fault, and  
17 therefore damages are permitted with respect to the pled  
18 cause of action.

19 When we talk about causes of action being recognized by  
20 our state, that includes not just liability in the elements  
21 attended thereto, but it includes damages, as well. And  
22 South Carolina simply -- not only has not recognized damages  
23 for a first party Dram Shop case, but they have specifically  
24 said that such a cause of action, a first party Dram Shop  
25 case, is not recognized.

1           And so this is one of those cases where, as a matter of  
2 law, we submit that the damages award must be zero because  
3 damages are not allowed for what has been pled. It's one of  
4 those cases where even if the allegations against the  
5 defendant are assumed to be true, which they are for purposes  
6 of today, our jurisprudence prompts us to ask, very  
7 respectfully, so what? So what? Even if they are true,  
8 because in South Carolina, those admitted facts do not lead  
9 to recovery.

10           The complaint states very clearly that Mr. Kimble  
11 consumed alcohol at the Defendant, Jay's Bar and Grill, that  
12 he drove away intoxicated, and was involved in a single-car  
13 accident that took his life. And at this damages hearing, we  
14 assume that all of that is true.

15           However, South Carolina does not allow for damages for  
16 that type of loss pursuant to *Tobias versus Sports Club*  
17 *Incorporated*, 474 S.E.2d 450. It's a 1996 case in front of  
18 the South Carolina Supreme Court case. And that court in  
19 Tobias did not tailor its finding to just cases that were  
20 simply not in default. It said that the full cause of action  
21 is not recognized. And that cause of action comes not only  
22 with duty and breach and causation, but it also includes  
23 damages.

24           So the Supreme Court of South Carolina has not  
25 recognized an avenue for recovery here. This is not a

1 situation where, if it was a cause of action recognized,  
2 liabilities admitted, now we just determine the amount.  
3 Here, South Carolina says we don't allow recovery for this.

4 It would be -- and the example is absurd, but sometimes  
5 absurd analogies help. It would be as if I sued Mr. Richter  
6 for having blue hair and he failed to answer the complaint in  
7 30 days. If -- that's not a recognized cause of action. No  
8 damages can be incurred by me because of him having blue  
9 hair. It's just not recognized, even if he goes into default  
10 in our Supreme ---

11 THE COURT: How about the negligence claims?

12 MR. HOLT: Well, those negligence claims refer to a duty  
13 that can only be found if granted by statute or Supreme  
14 Court. And the Supreme Court has said that the only statutes  
15 which create duties related to alcohol sales are the alcohol  
16 licensing statutes. But they have specifically -- and Tobias  
17 said, we will not allow that to go so far as to an adult  
18 first party Dram Shop claim.

19 So they have -- they've cut it off there. If left for  
20 another day, whether first party claims with respect to  
21 minors may be heard, Mr. -- Devon was not a minor at the  
22 time. He was an adult. Because he was an adult, he cannot  
23 bring a first party Dram Shop claim. But for the default,  
24 this is a case that would be 12(b)(6) just because it doesn't  
25 state the cause of action. And so because of that, Your

1 Honor ---

2 THE COURT: So are you -- so -- so you believe that  
3 they're -- that they're -- that his personal representative  
4 of parents, that there's no -- no -- no cause of -- no  
5 recognizable cause of action in South Carolina law that would  
6 allow them to sue for damages in this case?

7 MR. HOLT: That's absolutely correct. That is  
8 absolutely correct, based on Tobias and its progeny. With  
9 respect to -- have you answer any other question, Judge, but  
10 if I could turn to punitive damages at this time.

11 THE COURT: Yes, sir.

12 MR. HOLT: With respect to punitives. We, of course,  
13 Your Honor have already alluded in the prior hearing, and I  
14 know Your Honor is familiar with -- with the scheme for  
15 punitive damage that just cite to *Pacific Mutual Life*  
16 *Insurance versus Haslip*, which is a US Supreme Court case at  
17 499 U.S. 1(1991) case. But there are, of course, many  
18 others. Of course, some of the factors -- all the factors  
19 that are listed are the Defendant's degree of culpability.

20 There's been no evidence presented to The Court today in  
21 that regard. Two, the duration of the conduct. There's no  
22 testimony about the conduct of the Defendant, Jay's, put  
23 before The Court today. Third, the Defendant's awareness or  
24 concealment. I certainly heard no testimony in that vein,  
25 with respect to Jay's.

1 Four, the existence of similar past conduct. We've not  
2 seen any prior incidents that have been brought to The  
3 Court's attention this afternoon. Five, the likelihood that  
4 the award would deter the Defendant or others from like  
5 conduct. Of course, there's been no testimony presented in  
6 that vein, as well. Six, whether the award is reasonably  
7 related to the harm likely to result from the conduct.  
8 Again, no evidence there. And then, of course, finally, as  
9 Mr. Richter acknowledged, number seven, the Defendant's  
10 ability to pay was not discussed, as well. There's been no  
11 evidence of that. So there's not just one factor among many  
12 that has not been proven, but none of the other factors.

13 There's been no discussion whatsoever about the  
14 practices or procedures of Jay's Bar and Grill, about any of  
15 their failures whatsoever in the way they sell alcohol or  
16 keep people from buying it. None of that is before The  
17 Court.

18 And so we believe that the punitive damages part should  
19 fail because of that. And we believe the actual damages part  
20 should fail because of Tobias and its progeny, which says  
21 there is no cause of action in South Carolina which could  
22 possibly entitle anybody to a damages recovery in this case.  
23 Thank you, Your Honor.

24 THE COURT: Mr. Richter, how about that? If, while  
25 certainly Mr. Holt acknowledges, as he must, that all factual

1 allegations contained in the complaint are true. There still  
2 needs to be a viable, legal, recognized claim before any  
3 damages can be awarded; isn't that right?

4 MR. RICHTER: Your Honor, what the argument is -- it's  
5 the third time I've heard it, by the way. It's a -- it's  
6 asking you for a reconsideration of the reconsideration so  
7 that -- that exact same argument was made and seeking relief  
8 from the default, that there was no viable cause of action.  
9 The Court has ruled on that and he failed.

10 There was a motion to reconsider on that exact same  
11 argument that there is no viable cause of action, and he  
12 failed on the reconsideration. So I see this argument more  
13 as preserving issues for appeal than anything else. Your  
14 Honor, put it perfectly, not that I feel like we should be  
15 delving down this path, because it is a reconsideration of a  
16 reconsideration, but, no, Tobias talked about the pure  
17 statutory claim. Tobias didn't touch the issue of is -- is  
18 there a common law duty or not? And we pled it both ways in  
19 the complaint.

20 So I guess our Supreme Court will tell us one day  
21 whether or not there's a common law duty that is still owed  
22 in the first party Dram Shop case. And, Your Honor, with --  
23 with regard to the punitive damages, there's -- there's been  
24 no evidence of the culpability, the conduct, the awareness.  
25 There's no need for evidence of that.

1           It's all stipulated by admission and the complaint that  
2 they -- that they knowingly served a visibly intoxicated  
3 patron, and allowed that person to leave knowing that he was  
4 a risk of harm to himself. So by the nature of the  
5 proceedings, you wouldn't offer testimony on those things.  
6 This is a damages hearing, not a liability hearing.

7           On the punitive factors of there's been no evidence of a  
8 deterrence effect or that is reasonably related, those aren't  
9 evidentiary matters. Those are matters for The Court to  
10 consider. For The Court to consider in levying the penalty,  
11 is it -- is it one that will deter? Is it reasonably related  
12 to the conduct and to the harm caused? Those aren't  
13 evidentiary matters. Those are court matters.

14           And I would urge Your Honor that I -- the bigger the  
15 number, the greater the deterrence, but that's in your  
16 discretion, not mine. And I would urge Your Honor, that a  
17 one-to-one ratio is constitutionally permissible by any legal  
18 test that I know of. And it certainly bears a reasonable  
19 relationship between the damages and the harm done.

20           So respectfully, I've heard Mr. Holt's argument. I've  
21 heard it three times now. I take it more as just preserving  
22 an issue for an appeal, but, no, the matter before Your Honor  
23 is, what's the proper measure of damages in the case?

24           THE COURT: Yes, sir. What -- one -- one -- a couple  
25 questions, Mr. Richter. Has there been -- I'm asking this --

1 in my prior life, I didn't handle these types of cases, so I  
2 don't know the answer to this question. Are there any South  
3 Carolina cases that find that a common law duty for a first  
4 party Dram Shop case like this?

5 MR. RICHTER: No, sir. No, sir. I think we're in a  
6 vacuum. I think, as I read Tobias -- and we've argued this a  
7 couple of times. We're pretty clear on the statutory side,  
8 and the reason makes sense, because if it's a statutory  
9 violation, and you're going with negligence per se,  
10 negligence per se negates things like assumption of the risk  
11 and comparative fault. And so in a first party situation  
12 where an adult walks into a bar and over-consumes, I think  
13 our -- our court looked at that and said, you know what?  
14 That might go too far, as far as the statutory violation,  
15 because it prohibits even the arguments of assumption of the  
16 risk or comparative fault.

17 Now, a common law negligence claim does not do those  
18 things. It's the negligence per se claim, the statutory  
19 violation claim, that strips the bar owner of those  
20 circumstances of the ability to argue the comparative fault  
21 and the assumption. And so that's the vacuum that exists  
22 now.

23 And I guess through this case or another one, we'll find  
24 out from the Supremes whether or not there is the independent  
25 common law duty. But we styled it both ways. We -- we pled

1 both the statutory violations and common law duty violations.

2 THE COURT: Also, as to the punitive damages -- and I've  
3 heard both -- both parties' arguments on this and can see it  
4 from from both sides. But how am I -- how am I supposed to  
5 analyze these required factors when there -- I mean, there  
6 are some that I think are self-evident deterrence, for  
7 example. I'm not sure that there's a way that you could  
8 present evidence that X amount would deter them, Y amount  
9 would not.

10 So I get some of them may be a little more evident than  
11 others, but for things such as the duration of the conduct,  
12 the Defendant's awareness or concealment, similar past  
13 conduct, the ability to pay. I mean, there's -- there's  
14 really no evidence for me. I mean, I can certainly, you  
15 know, think one way or the other, speculate, I guess. But I  
16 mean, doesn't it require some degree of evidence above that?

17 MR. RICHTER: Respectfully, Your Honor, I don't think it  
18 does. As I read the body of case law of punitive damages,  
19 all the factors are there. But it's pretty clear to me that  
20 one or more of the factors can greatly outweigh the others.  
21 And you can have the case -- we always look at the  
22 Constitutional parameters. Is it two to one? Three to one  
23 is -- is greater than that? But we're all aware of the cases  
24 too that say, look, the conduct may be so disproportionate to  
25 the actual harm that we can depart from those standards. So

1 I think those are out there as guidelines.

2 But I think the case law, the body of case law, is clear  
3 that one -- one can outweigh the others, and that evidence of  
4 each and every one is not required. So I don't think it's a  
5 defect in a punitive request, because the state of this case  
6 didn't afford discovery to find out the ability to pay.

7 THE COURT: Right. And which leads to my next question.  
8 And this could be a very dumb one, and it could be one that  
9 the answer is not known, and the answer might not -- either  
10 way, may not lead to anything. But certainly, Mr. Richter,  
11 you and Mr. Holt are a lot more experienced in this area of  
12 the law than I am. As -- is there ever a time where -- in a  
13 case such as this, where there's been a default? Where there  
14 is limited discovery on the factors of punitive damages? Or  
15 is that just -- am I just making that up and that's a stupid  
16 thing to ask?

17 MR. RICHTER: Your Honor, I'm not aware of that. I  
18 don't believe discovery is available in a default  
19 circumstance. Kind of the pro and con of being in default, I  
20 suppose.

21 THE COURT: Yes, sir. Mr. -- those are the questions  
22 that I had for you, Mr. Richter. Mr. Holt, I guess -- I  
23 guess here we've got a situation where I think the statute is  
24 clear. But as Mr. Richter points out, in the absence of a  
25 case saying that there is or is not a duty, is this a

1 situation that you believe should have no remedy for -- for  
2 the wrong that's occurred?

3 MR. HOLT: Your Honor, the Supreme Court has indeed  
4 spoken on this in that same Tobias case. I'm looking at the  
5 Court of Appeals case, 474 S.E.2d 450, and this is on page  
6 451. It reads, at common law, a tavern owner had no  
7 liability for serving alcohol to an intoxicated person who  
8 later injured himself or others. So that is the common law  
9 view.

10 And what South Carolina has done is, it has said,  
11 despite that common law view, recognizing that there is no  
12 liability, we will allow liability based on licensing  
13 statutes, but we will only allow it to go so far. And the  
14 de-limiter is that there is no Dram Shop liability under  
15 those statutes for a first party Dram Shop case where the  
16 drinker is also the decedent.

17 THE COURT: Let me ask you this, though. I mean, is  
18 there -- is there precedent or any cases out there that say  
19 what -- what your position is -- is listen, we're in default.  
20 We get it. We know we can argue liability. However, the  
21 pleading is legally defective in that it does not assert a  
22 claim upon which relief can be granted. So you have to give  
23 them zero. I mean, that sounds like a 12(b)(6) argument that  
24 if your clients were not in default, could certainly make. I  
25 mean, I have no idea what the result would be, but don't you

1           forfeit that argument when you're in default?

2           MR. HOLT: Not because -- now, if -- again, if this were  
3 any other case with the recognized cause of action, we  
4 absolutely would. But the reason we don't here is because a  
5 cause of action is not merely duty breach inquiry.

6           THE COURT: Where's the case that says that that's what  
7 I need? I mean, I hear what you're saying and it makes  
8 sense. And on the other side, it seems that -- you know,  
9 that -- that it's not entirely clear about some of the other  
10 issues. But where is it that says in a default situation  
11 where liability is admitted, that if it doesn't state a claim  
12 and wouldn't pass muster under 12(b)(6), if -- if the  
13 defendant timely answered, that at the damages hearing you  
14 can say zero?

15          MR. HOLT: I guess mine out, and I'd be happy to do some  
16 additional search into the argument. I'm making Your Honors  
17 based on the idea that damages are not going to flow without  
18 a duty to begin with. The elements have to -- have to  
19 connect. And so ---

20          THE COURT: They've alleged to do -- they've alleged a  
21 duty in the complaint, and that allegation is deemed  
22 admitted. What I'm trying to get to -- I see -- at least, I  
23 think I see your argument, which is, you know, to use your  
24 example, you know, if you allege, you know, unfair trade  
25 practice about something that has nothing to do with it, and

1 then you're in default, you say, well, South Carolina law is  
2 so crystal clear that can't be alleged. And I mean it --  
3 doesn't that give you a second bite at the apple of trying to  
4 get the case dismissed after you've been found in default?

5 MR. HOLT: Only in cases where there's no cause of  
6 action recognized. And this is why this is very unique  
7 today. This is not a normal situation where he would have  
8 pled a non-cause of action. A non-cause of action can't have  
9 a duty. It can't have breach. It can't have causation. It  
10 can't have damages. It can't have any of that.

11 THE COURT: I know, but those are all arguments for a  
12 12(b)(6), or 50, you know, or summary judgment in this case,  
13 whether -- I mean, you know, Mr. Richter's argument is  
14 whether there's a duty or not, whether a court may eventually  
15 in the future find that there's a duty or not, we've alleged  
16 there is one. And that has been deemed admitted by you, that  
17 there is a duty because you failed to answer that. That is  
18 -- that -- that's alleged.

19 There's no case that says, at least that -- that I've  
20 been presented, that -- that there has to be a legally  
21 recognized -- I mean, it makes sense on one level, but -- it  
22 just seems like what you're arguing in theory makes sense,  
23 but the fact that everything has been admitted in there.

24 I just -- I feel like that there -- this can't be the  
25 first time that this has ever happened, is it? Is there any

1 case out there that says that I'm allowed to to go back and  
2 look at the complaint through the lens of 12(b)(6), and if  
3 it's not a recognized claim, then I can say zero? But  
4 otherwise, I mean, doesn't that -- doesn't that cause me to  
5 have to second or third guess?

6 MR. HOLT: We're not asking you, Your Honor, to do that.  
7 You're -- I agree. Duty, breach, causation, that's off the  
8 table. No discussion about that is to be had here today.  
9 But damages is still very much alive and well. And I think  
10 Your Honor must look at damages also within the broader cause  
11 of action.

12 Damages do not exist without a cause of action, and so  
13 we're only talking about damages today. So Your Honor must  
14 look at where those damages are within a cause of action.  
15 Again, even assuming we breach to duty and that duty, that  
16 breach of duty, has caused damages, even assuming that, are  
17 those damages recognized in South Carolina, and not only had  
18 they not been recognized, they've been prohibited, as Tobias  
19 tells us as to as the punitive. So I could just -- I know,  
20 Your Honor ---

21 THE COURT: Yes, sir.

22 MR. HOLT: --- it's been a long day.

23 THE COURT: I'm sorry. I didn't mean to interrupt you.

24 MR. HOLT: No. No, Your Honor. I would just say as to  
25 punitives, again, there must be evidence offered. I

1 understand that much of it has been discussed in the  
2 complaint, but we're at the damages phase now. There must be  
3 evidence offered.

4 And Your Honor got to this about -- you've got to have  
5 something to calculate your punitive damages award. We heard  
6 that with respect to actuals, there was much testimony. We  
7 didn't hear anything related to punitive and so we'd ask The  
8 Court not to grant punitive. Thank you, sir.

9 THE COURT: And do you believe -- I'm sorry, Mr. -- let  
10 me ask one last question. I mean, and, again, it probably is  
11 not permitted in. Mr. Richter, I would have certainly  
12 believed if it's ever been done, would have heard it. But I  
13 mean, is there any -- is there any authority that you're  
14 aware of where there could be in the absence of evidence on  
15 punitive damages, some limited discovery on that in a default  
16 situation? I can't imagine that's ever happened, but I mean,  
17 I haven't.

18 MR. HOLT: I have heard of limited discovery and in some  
19 default scenarios on some issues, but I can't cite a case,  
20 Your Honor.

21 THE COURT: Okay. And, again, I'm not saying that  
22 that's something I'm thinking about or would think about.  
23 I'm just, you know, you see a problem there, and sometimes  
24 you just go into solution mode. Mr. Richter, it's your  
25 motion, your hearing, sir. I'll be happy to hear from --

1 from -- you get the final word.

2 MR. RICHTER: Final words, Your Honor. If The Court  
3 feels squishy about punitives, and I urge you that you should  
4 not, we're happy to revise our request to 10 million actuals  
5 and no punitives. So we'll -- we'll -- we'll ask in the  
6 alternative and leave that to The Court's better discretion.  
7 With regards to this argument that's been made out for three  
8 times.

9 So an expert once told me this saying that kind of stuck  
10 with me. You know, when you hear hooves, think horses not  
11 zebras. All right. And so what that means is, the most  
12 obvious thing is probably right. And your instincts, Your  
13 Honor, are right here. This is not the exotic one off that  
14 Mr. Holt suggests to you that it is. This is nothing more  
15 than a recast of the exact same argument that's been made at  
16 least twice now and is improper in this context because he  
17 said it himself.

18 If you -- we're past duty, breach, and proximate cause.  
19 Well, that's all there is, Your honor, I mean to say, but  
20 we're still going to talk about damages and isolation. No,  
21 you're not, because his argument seeks to pull those same  
22 issues back in by wrapping them as in this blanket of -- but  
23 the duty breach and causation that we've admitted to are  
24 duties, breaches, and causations that don't exist here in  
25 South Carolina. That's nonsensical. That's a zebra. So

1 when you hear hooves, think horses. The horse says they're  
2 in default.

3 All they're entitled to do at this setting is argue as  
4 to the amount of damages. This is nothing more than a recast  
5 of the same argument that's been made twice now.

6 THE COURT: Yes, sir. Well, I want to thank the lawyers  
7 for -- for very good briefs, very good arguments. Both of  
8 you are very knowledgeable on this issue. But the last thing  
9 that I want to -- and so what I'm going to do is, I'm going  
10 to take this under advisement.

11 I need to look at this issue. I know it's been  
12 presented before, but I want to make sure that I'm -- that  
13 I'm -- there's nothing out there that I was asking about. I  
14 feel like that if there was, certainly all would have known  
15 it. But I will need to ruminate and look at that some, and  
16 I'll certainly let you all know, excuse me, as soon as I have  
17 a decision. The last thing I'd like to do is, is to tell  
18 Mr. And Mrs. Kimble, how generally and -- and truthfully,  
19 sorry I am. And I'm sure that -- that all the lawyers are  
20 here. I know it -- it's tough when everybody has a job to  
21 do, when the -- the important -- super important issues here  
22 are the ones that y'all have addressed. And as a parent, I  
23 can't sympathize with you enough.

24 I'm so sorry that I can't do anything here that would --  
25 I know that you -- that more than anything, you'd like to

1 have them back, and that's first and foremost in your mind.  
2 I wish there was something we can do, but I want to tell you  
3 that -- that I know that -- how hard this is -- had to have  
4 been on y'all, not just as parents, but as people, too. And  
5 in -- and, you know, you're very lucky to have each other,  
6 and I hope that this will in some way bring some type of  
7 closure so that y'all can move on.

8 But I just wanted to tell you I really appreciate you  
9 all being here. I know it couldn't be -- couldn't have been  
10 easy at all. So I wish you the best.

11 MR. KIMBLE: Thank you.

12 MS. KIMBLE: Thank you.

13 THE COURT: All right. Thank you all very much. And  
14 we'll stand adjourned.

15 MR. RICHTER: Thank you, Your Honor.

16 MR. HOLT: Thank you, Your Honor.

17 THE COURT: Yes sir.

18  
19  
20 (THERE BEING NO FURTHER TESTIMONY, THIS HEARING IS CONCLUDED)  
21  
22  
23  
24

## CERTIFICATE OF TRANSCRIBER

I, Pam Gray, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Richland County, South Carolina, on the 17th day of September, 2024.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 16, 2025

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Pam Gray  
Certified Transcriber



Charleston, South Carolina  
September 27 2023

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SWORN TO AND SUBSCRIBED before me this  
27<sup>th</sup> day of September, 2023.

  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission Expires: 9 / 25 / 29

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND ) CIVIL ACTION NUMBER: 2023-CP-40-03052

Portoundo M. Kimble, as Personal )  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )

**NOTICE OF MOTION AND MOTION  
FOR DEFAULT**

)  
)  
)  
Plaintiff, )

vs. )

Jays Bar and Grill, LLC )

)  
)  
Defendant. )

PLEASE TAKE NOTICE THAT, pursuant to S.C.R.C.P. Rule 55, Plaintiff hereby moves for an entry of default against the Defendant. Thirty (30) days have passed since the service of the Complaint in this matter, and Defendant has failed to answer, make motions, or otherwise enter any sort of appearance as evidenced by the accompanying affidavit.

As of the date of this Motion, Defendant has failed to serve an Answer, or otherwise respond to Plaintiff's Summons and Complaint within the required time period.

In addition, a request of an entry of default by the Clerk, Plaintiff also applies to this Court for default judgment pursuant to S.C.R.C.P. 55(b). Plaintiffs pray for judgment for the relief demanded in the Complaint pursuant to S.C.R.C.P. 4(b), and Plaintiff moves this Court to hold a hearing to determine the appropriate damages in this matter pursuant to Rule 55(b).

**REMAINDER OF PAGE INTENTIONALLY LEFT BLANK**

**SIGNATURE PAGE TO FOLLOW**

Charleston, South Carolina  
October 5, 2023

**BLAND RICHTER, LLP**  
*Attorneys for Plaintiff*

s/Ronald L. Richter, Jr.

Ronald L. Richter, Jr. (SC Bar No. 66377)

Scott M. Mongillo (SC Bar No. 16574)

Peoples Building

18 Broad Street, Mezzanine

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Eric S. Bland (SC Bar No. 64132)

105 West Main Street

Suite D

Lexington, South Carolina 29072

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Facsimile 803.256.3056

[ericbland@blandrichter.com](mailto:ericbland@blandrichter.com)





Richland Common Pleas

**Case Caption:** Portundo M Kimble , plaintiff, et al vs Jays Bar And Grill Llc

**Case Number:** 2023CP4003052

**Type:** Order/Entry of Default

So Ordered

s/Jeanette W. McBride, by Virginia F. Belcher,  
Chief Deputy Clerk of Court

Electronically signed on 2023-10-06 09:00:36 page 2 of 2

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND ) CIVIL ACTION NO.: 2023-CP-40-03052

Portoundo M. Kimble, as Personal )  
Representative of the Estate of )  
Devon Enrique Kimble, Deceased, )

Plaintiff, )

vs. )

Jays Bar and Grill, LLC )

Defendant. )

**NOTICE OF MOTION AND MOTION  
FOR A DEFAULT DAMAGES HEARING  
PURSUANT TO RULE 55(b)(2) OF THE  
S.C.R.CIV.P.**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through his undersigned attorneys, hereby respectfully requests that a an order of default and default damages hearing pursuant to Rule 55(b)(2) of the S.C.R.Civ.P. be scheduled in the above-referenced matter within ten (10) days of the filing of this Motion, or as soon thereafter as counsel may be heard, and in support thereof, Plaintiffs aver as follows:

1. A Summons and Complaint was filed in this matter on June 12, 2023.

2. Diligent efforts were made to serve the Registered Agent for the Defendant, but such attempts proved unsuccessful. Copies of the Affidavits of Non-Service are attached hereto as **Exhibit 1 and Exhibit 2.**

3. Counsel ultimately petitioned the Court and was granted service of the Summons and Complaint upon the Defendant by Publication. A copy of the Affidavit of Service by Publication is attached hereto as **Exhibit 3.**

4. More than thirty (30) days has elapsed since the legal service by publication of the Summons and Complaint on Defendant. No Notice of Appearance, Answer, Motion to Dismiss or other Motion or appearance of any kind was served or filed, and the Defendant is in default in

this matter. Upon information and belief, the provisions of the Soldiers and Sailors Civil Relief Act do not apply as Defendant is not a member of the military service of the United States.

5. On October 5, 2023, Plaintiffs Motion for Default and Affidavit of Default as to the Defendant were filed with the Court. On October 6, 2023, The Honorable Jeanette McBride, Clerk of Court for Richland County, signed and filed an Entry of Default Order by Clerk.

6. Further, the damages in this matter are not liquidated and the other relief requested must be resolved by this Court.

WHEREFORE, for the foregoing reasons, Plaintiffs pray for judgment for the relief demanded in the Complaint pursuant to S.C.R.C.P. 4(b) and request that this Court schedule and hold a damages hearing to determine the appropriate damages in this matter pursuant to Rule 55(b)(2) of the S.C.R.Civ.P.

October 9, 2023  
Charleston, South Carolina

**BLAND RICHTER, LLP**  
*Attorneys for Plaintiff*

*s/Ronald L. Richter, Jr.*

Ronald L. Richter, Jr. (SC Bar No. 66377)

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*s/Eric S. Bland*

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Eric S. Bland\*

Ronald L. Richter, Jr.

Scott M. Mongillo, Associate

\*Also admitted in PA & FL  
[www.blandrichter.com](http://www.blandrichter.com)

October 10, 2023

The Honorable Jeanette W. McBride  
Richland County Clerk of Court  
Post Office Box 2766  
Columbia, SC 29202

Reply to:

105 West Main Street  
Suite D  
Lexington, SC 29072  
Phone: 803.256.9664  
Fax: 803.256.3056  
[ericbland@blandrichter.com](mailto:ericbland@blandrichter.com)

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[ronnie@blandrichter.com](mailto:ronnie@blandrichter.com)  
[scott@blandrichter.com](mailto:scott@blandrichter.com)

**Re: Portoundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased v. Jays Bar and Grill, LLC**

Dear Ms. McBride:

On October 9, 2023, counsel for the Plaintiff filed Plaintiff's Notice of Motion and Motion for a Default Damages Hearing Pursuant to Rule 55(b)(2) of the S.C.R.Civ.P. in connection with the above-referenced matter. However, the exhibits referenced in the Motion were inadvertently omitted from the filing. I am filing as an exhibit to this letter the exhibits originally omitted. Please associate these exhibits with the motion filing.

Please do not hesitate to contact me with any questions.

Thanking you for your assistance with this matter, I am

Sincerely yours,

*s/Eric S. Bland*

Eric S. Bland

ESB/mfs  
Attachments

**ROA-0137**

# STATE OF SOUTH CAROLINA

## AFFIDAVIT OF DILIGENT SEARCH

RICHLAND COUNTY

COURT OF, COMMON PLEAS

DOCKET # 2023-CP-40-3052

PORTUNDO M. KIMBLE, A PERSONAL REPRESENTATIVE OF

THE ESTATE OF DEVON ENRIQUE KIMBLE, DECEASED

-VS-

JAYS BAR AND GRILL, LLC

THE UNDERSIGNED, JEFF COSTNER, BEING DULY SWORN STATES HE ATTEMPTED SERVICE ON THE FOLLOWING DOCUMENTS : (1) SUMMONS (2) COMPLAINT (3) PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT (4) PLAINTIFF'S FIRST REQUEST FOR PRODUCTION TO DEFENDANT

IN THE FOREGOING ACTION ON : JAYS BAR AND GRILL, LLC

AFTER A DILIGENT SEARCH THIS PERSON CANNOT BE LOCATED AND THE PROCESS SERVER STATES HE HAS ATTEMPTED SERVICE ON THE FOLLOWING DATES, TIMES AND ADDRESSES.

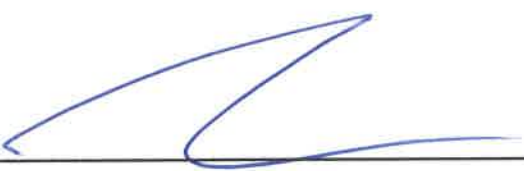
THE SERVER, JEFF COSTNER HAS MADE THE FOLLOWING ATTEMPTS TO SERVE A JAY KALIN, JR, WHO IS THE REGISTERED AGENT FOR SERVICE FOR JAYS BAR AND GRILL, LLC AT THE BUSINESS LOCATION AT, 902 GERVAIS STREET, SUITE D, COLUMBIA, SOUTH CAROLINA 29201, ON JUNE 20, 2023, AT 8:45 am, THE SERVER WAS TOLD HE WAS NOT THERE, MAY BE IN LATE THAT AFTERNOON, ATTEMPTED AGAIN ON JUNE 20, 2023 AT 4:40 pm, SERVER WAS TOLD HE IS NOT THERE, AND WAS NOT COMING IN THAT DAY, ATTEMPTED ON JUNE 21, 2023 AT 5:10 pm, THE SERVER WAS TOLD HE IS NOT THERE AND HE WAS TOLD THEY DID NOT KNOW IF HE WAS COMING IN OR NOT. ATTEMPTED ON JUNE 22, 2023 AT 5:00 pm, THE SERVER WAS TOLD HE WAS NOT THERE. THE SERVER HAS NOTICES THAT THERE IS USUALLY A BLACK PORSCHE IN THE BACK PARKING LOT ON SEVERAL OCCASIONS, WHEN ATTEMPTED AND BELIEVED TO BE THE VEHICLE THAT JAY KALIN JR DRIVES, ATTEMPTED ON JULY 05, 2023 AT 9:00 am, THE FRONT DOOR WAS OPEN AT THE RESTAURANT, THE SERVER HOLLERED SEVERAL TIMES AND WAS UNABLE TO GET ANYONE TO COME UP TO THE BAR AREA. ATTEMPTED ON JULY 06, 2023 AT 8:10 pm, A WHITE MALE AT THE FRONT GATE TOLD THE SERVER HE WAS NOT THERE, ATTEMPTED SERVICE AGAIN ON JULY 14, 2023 AT 10:00 am, THE BLACK PORSCHE WAS IN THE BACK BUT THE SERVER WAS TOLD BY A BLACK MALE HE WAS


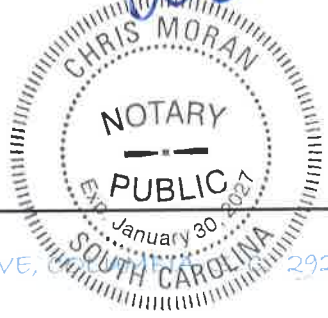
ROA-0138

NOT IN TODAY. ATTEMPTED ON JULY21, 2023 AT 3:30 pm, AND WAITED UNTIL 5:10 pm, A BLACK MALE CAME OUT AND TOLD THE SERVER HE WAS NOT COMING IN TODAY.

THE SERVER HAS ALSO ATTEMPTED A SECOND ADDRESS AT, 621 GADSDEN STREET, SUITE A, COLUMBIA, SOUTH CAROLINA 29201, THIS ADDRESS IS JAY'S VAPE SHOP, A WHITE MALE TOLD THE SERVER THAT HE IS USALY NOT AT THIS ADDRESS, JUST ONCE IN A WHILE. THE SERVER HAS LEFT A BUSINESS CARD WITH EMPLOYEES SEVERAL TIMES WITH NO RETURN CALLS. THE SERVER HAS SEARCHED FOR ANY OTHER ADDRESSES, SOCIAL MEDIA AND HAS NOT LOCATED ANYTHING BUT THE BUSINESS LOCATION.

  
\*\* JEFF COSTNER – PROCESS SERVER \*\*

  
SWORN BEFORE ME THIS, 23rd DAY OF, JULY 2023  
MY COMMISSION EXPIRES : 1-30-27

COSTNER'S LEGAL SERVICE, 2109 KATHLEEN DRIVE, SOUTH CAROLINA 29210

ELECTRONICALLY FILED - 2023 Jul 31 9:50 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052  
ELECTRONICALLY FILED - 2023 Oct 10 12:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052

EXHIBIT  
2

AFFIDAVIT OF NON-SERVICE

State of South Carolina

County of Richland

Common Pleas Court

Case Number: 2023-CP-40-3052

Plaintiff:  
**Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,**

vs.

Defendant:  
**Jays Bar and Grill, LLC**

For:  
Bland Richter LLP  
105 West Main Street, Suite D  
Lexington, SC 29072

Received by Milligan & Associates LLC to be served on **JAYS BAR AND GRILL LLC c/o Jay Kalin, Jr Registered Agent, 104 High Circle 8 B, Myrtle Beach, SC 29572.**

I, Roger Turner, being duly sworn, depose and say that on the **13th day of June, 2023 at 12:15 pm, I:**

**NON-SERVED:** After due search, careful inquiry and diligent attempts I was unable to serve the **Summons and Complaint** for the reason that, **RENTAL PROEPRTY OWNED BY THE DEFENDANT - WHEREABOUTS UNK PER OCCUPANT** ,or information to allow further search.

I certify that I am over the age of 18, have no interest in the above action, and in good standing, in the judicial circuit in which the process was served.



**Roger Turner**  
Process Server

**Milligan & Associates LLC**  
Process@MilliganAndAssociates.com  
P.O. Box 4845  
Florence, SC 29502-4845  
(843) 667-4747

Subscribed and Sworn to before me on the 14th day of June, 2023 by the affiant who is personally known to me.



PRINT NAME

NOTARY PUBLIC

DAVID P MILLIGAN  
NOTARY PUBLIC  
State of South Carolina  
My Commission Expires Apr. 25, 2026

Our Job Serial Number: DPM-2023000360  
Ref: Kimble v. Jays Bar

ELECTRONICALLY FILED - 2023 Jul 31 10:02 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052  
ELECTRONICALLY FILED - 2023 Oct 10 12:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052

Mary-Ellen Shirley Bland Richter, LLP  
105 WEST MAIN ST. SUITE D  
LEXINGTON SC 29072

ELECTRONICALLY FILED - 2023 Aug 31 12:19 PM - RICHLAND COMMON PLEAS - CASE#2023CP4003052  
ELECTRONICALLY FILED - 2023 Oct 10 12:49 PM - RICHLAND COMMON PLEAS - CASE#2023CP4003052

### AFFIDAVIT OF PUBLICATION



State of South Carolina  
County of Richland

Personally appeared before me the undersigned advertising clerk of the above indicated newspaper published in the city of Columbia, county and state aforesaid, who, being duly sworn, says that the advertisement of

State of South Carolina  
County of Richland  
In the Court of Common Pleas  
For the Fifth Judicial Circuit  
Civil Action Number: 2023-CP-40-03052  
  
Portourido M. Kimble as Personal Representative of the Estate of Enrique Kimble, Deceased vs. Jays Bar and Grill, LLC  
  
TO Jay Kalin, Jr., Registered Agent for Jays Bar and Grill, LLC and Jays Bar and Grill, LLC  
  
YOU ARE HEREBY SUMMONED and required to answer the Complaint in this

action, which was filed on June 12, 2023 and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service by publication hereof, exclusive of the day of such service, and you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the complaint.  
  
Eric S. Bland, Esc.  
Bland Richter, LLP  
105 West Main Street, Suite D  
Lexington, SC 29072

(copy attached)

appeared in the issues of said newspaper on the following day(s):

- 08/09/23 Wed FT
- 08/16/23 Wed FT
- 08/23/23 Wed FT

at a cost of \$114.00  
Account# 370315  
Order# 2050245  
P.O. Number:

Subscribed and sworn to before me this 23<sup>rd</sup> day of August A.D. 2023

advertising clerk



NOTARY PUBLIC, SC  
My commission expires

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF RICHLAND ) THE FIFTH JUDICIAL CIRCUIT

Portundo M. Kimble, as Personal ) Civil Action No.: 2023CP4003052  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )  
 )  
Plaintiff, )

v. )

Jays Bar and Grill, LLC, ) MOTION TO SET ASIDE DEFAULT  
 )  
 )  
Defendant. )

**TO: ERIC S. BLAND, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND TO THE PLAINTIFF ABOVE-NAMED:**

**YOU WILL PLEASE TAKE NOTICE** that the undersigned, as attorneys for Defendant Jays Bar and Grill, LLC (hereinafter “Defendant”) will appear on the tenth (10<sup>th</sup>) day after service hereof, or as soon after counsel may be heard, before the presiding Judge, and move for an Order setting aside the entry of default against the Defendant. This motion is made pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure and is made because good cause exists for relief from the entry of Default. The reasons good cause exists include but are not limited to the fact that Jays Bar and Grill, LLC, was not properly served. Moreover, a meritorious defense exists due to the first-party nature of the dram shop claim. Finally, the motion is made without delay as Defense counsel immediately contacted Plaintiff’s counsel upon assignment of the file and movement was made toward a potential consent set aside. But as that has not yet been formalized, this motion is hereby filed.

This Motion may be further supplemented by affidavits, citations to relevant authority, a

memorandum of law, and/or any other admissible information prior to the hearing.

Respectfully submitted,

**SWEENEY, WINGATE & BARROW, P.A.**

s/Ryan C. Holt

Ryan C. Holt, SC Bar No. 78338

Brian L. Craven, SC Bar No. 78002

Sweeny, Wingate & Barrow, P.A.

Post Office Box 12129

Columbia, SC 29211

(803) 256-2233

**ATTORNEYS FOR DEFENDANT**

Columbia, South Carolina

March 22, 2024

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF RICHLAND ) THE FIFTH JUDICIAL CIRCUIT

Portundo M. Kimble, as Personal ) Civil Action No.: 2023CP4003052  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )  
 )  
Plaintiff, )

v. )

Jays Bar and Grill, LLC, )

MEMORANDUM IN SUPPORT OF  
MOTION TO SET ASIDE DEFAULT

Defendant. )

COMES NOW, Defendant Jays Bar and Grill, LLC (hereinafter, "Jays"), who submits this memorandum in support of its Motion to Set Aside Default.

**NATURE OF CASE**

This action alleges overservice of alcohol and a subsequent car crash which allegedly caused personal injury to Plaintiff.

**FACTUAL AND PROCEDURAL HISTORY**

Plaintiff's Decedent allegedly visited Jays on March 5, 2023, consumed alcohol, and became extremely intoxicated. Compl. ¶¶ 6-7 (Ex. 1). At approximately 2:00 a.m., Decedent left Jays and drove a vehicle. Compl. ¶¶ 8-9. While driving, Decedent was involved in a single-car accident, resulting in the Plaintiff's death. Compl. ¶¶ 9-10.

Plaintiff brought this action against Jays on June 12, 2023. See Compl. Plaintiff alleges negligence, negligence per se, and negligent hiring, training, supervision, and retention against Jays. See Compl. Plaintiff attempted to serve Jays' registered agent, Jay Kalin, Jr., at an address in Myrtle Beach, South Carolina but was unsuccessful. Pl.'s Aff. of Non-Service (Ex. 2).

Thereafter, Plaintiff attempted to serve Kalin at Jays several times but was unsuccessful. Pl.'s Aff. of Diligent Search (Ex. 3). Then, Plaintiff obtained an order for publication and submitted a publication about the summons and complaint in *The Free Times* on August 9, 2023, August 16, 2023, and August 23, 2023. *See* Order for Publication (Ex. 4); Pl.'s Aff. of Publication (Ex. 5).

### **LEGAL STANDARD**

“Rule 55(c) should be ‘liberally construed to promote justice.’” *Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008) (citation omitted). In *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009), the Supreme Court detailed the applicable standard for a motion to be relieved from default:

The standard for granting relief from an entry of default under Rule 55(c) is mere “good cause.” This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.

383 S.C. at 607-08, 681 S.E.2d at 888 (quoting Rule 55(c)).

### **LEGAL ARGUMENT**

#### **I. Good cause exists to grant Jays relief from default.**

In this matter, good cause exists to grant Jays relief from default because the publication order was improvidently granted. The Plaintiff's own filings of non-service bear this assertion out. Service by publication was not warranted in this case because it did not meet the dictates of § 15-9-710 of the South Carolina Code, which governs when service by publication may be had. Section 15-9-710 permits an order of publication when the following three requirements are met:

1. “the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State”;

2. “a cause of action exists against the defendant in respect to whom the service is to be made”; and

3. “the defendant is a resident of this State and after a diligent search cannot be found”

Part of the third requirement has been met. Defendant is a domestic corporation. The remaining requirements have not been met.

**A. Plaintiff’s search for Defendant was not diligent.**

As to the first requirement (and the second part of the third requirement), the order of publication was improvidently issued because Plaintiff failed to conduct a diligent search in its attempt to accomplish service. While Plaintiff asserts in its affidavit of non-service that process server Roger Turner attempted to serve Kalin at 104 High Circle, 8 B, Myrtle Beach, South Carolina, 29572, no evidence exists that Plaintiff attempted to serve Kalin at this address more than once, even though it was the address of the registered agent listed with the Secretary of State for service of process.

Moreover, Plaintiff did not supplement the failed in-person service by attempting to serve the summons and complaint by certified or registered U.S. Mail. *See Ingle v. Whitlock*, 282 S.C. 391, 392, 318 S.E.2d 367, 368 (1984) (finding that the professional process server diligently attempted to locate the defendant by attempting to locate him at his last known address and another address, contacted the mail carriers who delivered mail to him, contacted his stepmother, made several neighborhood inquiries, and contacted electric and water utilities without avail.).

Plaintiff also asserts in its affidavit of diligent search that Jeff Costner attempted to serve Kalin at the business location of Jays, which is located at 902 Gervais Street, Suite D, Columbia, South Carolina, 29201. While Costner stated in the affidavit he attempted service on seven different days, all of the attempts were made *before* the busy hours at Jays. In fact, all of the

attempts but one were made before the *business hours* of Jays, which start at 8 p.m. and end at either 1 a.m. or 2 a.m. *See* Ex. 6. The one time Mr. Costner attempted service during Jays' business hours, it was 8:10 p.m., which is the beginning of Jays' opening and not during the busy rush, so it is reasonable that Kalin was not present. Moreover, Jays is not as busy during the summer months compared to other times of the year, as the college crowd is not in Columbia, so it is further reasonable that Kalin is not present at Jays during the summer months when the business is not as busy.

Even though Costner attempted service once at Jay's Vape & Wellness, an affiliated business of Jays, Costner acknowledged in the affidavit that he was told Kalin is not usually at that address. Thus, it is not reasonable for Kalin to be served at Jay's Vape & Wellness. Therefore, although Plaintiff alleges he attempted multiple times to serve Kalin, these attempts do not constitute due diligence.

**B. No cause of action exists to warrant an order of publication.**

Further, Plaintiff's service by publication was inappropriate because no cause of action has been asserted against Jays. The second prong of Section 15-9-710 requires a cause of action to exist before an order of publication is warranted.

South Carolina precedent does not recognize a first party dram shop cause of action. *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 91, 504 S.E.2d 318, 319 (1990) ("We now join the majority of jurisdictions that have addressed this issue, and hold that South Carolina does not recognize a 'first party' cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of [S.C. Code Ann. §§ 61-4-580(2)] and/or [61-6-2220]."). The Supreme Court is clear that "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." *Id.* at 92, 504 S.E.2d at

319-20. Plaintiff filed a negligence cause of action against Jays alleging Jays violated South Carolina Code sections 61-4-580 and 6-16-2220. However, Plaintiff's Decedent was involved in a single-car crash, and Jays cannot be responsible for Plaintiff's own conduct. The allegations of Plaintiff's complain clearly articulate an impermissible first-party dram shop case:

**STATEMENT OF FACTS**

6. On the night of March 5, 2023, Decedent worked hard and looked forward to meeting friends at Jay's Bar and Grill.

7. Upon information and belief, while at Jay's Bar and Grill, Decedent was served alcohol by Defendant to the point of becoming extremely and visibly intoxicated, in violation of South Carolina law.

8. Upon information and belief, Decedent left Defendant's establishment at approximately 2:00 am. Decedent had been served by the employees of Defendant, acting within the scope of their employment, to a point of gross intoxication.

9. At approximately 2:00 am, Decedent was attempting to drive home when his motor vehicle left the roadway and was involved in a serious single-car accident.

10. The Decedent was killed.

11. His blood alcohol content at the time of the accident was approximately three times the legal limit.

A first party cause of action against Jays on behalf of Plaintiff cannot exist, and Plaintiff has not asserted a viable cause of action against Jays. Without a viable cause of action, Plaintiff's order of publication does not meet the statute requirements and is not effective. Moreover, the absence of a cause of action satisfies the meritorious defense requirements of Rule 55(c), SCRCP.

**C. Plaintiff failed to comply with the requirements for service by publication as presented in the applicable statutes.**

Second, service by publication was defective in this case because it did not meet the dictates of § 15-9-740 of the South Carolina Code which governs service by publication. Section § 15-9-740 states in part:

The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, **most likely to give notice to the person to be served** and for such length of time as may be deemed reasonable not less than once a week for three weeks.

S.C. Code Ann. § 15-9-740 (emphasis added). In *Hopkins v. Brown*, No. 2006-UP-276, 2006 WL 7286059, at \*3 (S.C. Ct. App. June 8, 2006), the Court of Appeals determined that service by publication of general circulation should be in the county where the person to be served was last known to reside to comply with S.C. Code Ann. § 15-9-740. *Hopkins v. Brown*, No. 2006-UP-276, 2006 WL 7286059, at \*3 (S.C. Ct. App. June 8, 2006).

In this case, notice was placed in the *Columbia Free Times* for three consecutive weeks. The *Free Times* is not the publication that should have been used. First, while Jays is located in Richland County, Kalin is listed as the registered agent with an address in Horry County. *See* Pl.'s Aff. of Non-Service. Second, the *Columbia Free Times* only posts news about Columbia and the Richland County community. Therefore, it does not have large enough circulation to afford Jays its due process rights because its registered agent, Kalin, is associated with an Horry County address.

**II. The specifically enumerated considerations required by the Court in analyzing a Rule 55(c) motion weigh in favor of Jays.**

“Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious

defense; and (3) the degree of prejudice to the plaintiff if relief is granted.” *Sundown Operating Co.*, 383 S.C. at 607-08, 681 S.E.2d at 888.

First, Jays moved immediately to respond to the Plaintiff’s legal proceedings once notified of them on March 4, 2024, including informing its insurance carrier and cooperating with counsel. Within days, counsel for Jays filed the corresponding motion for relief. Second, Jays has a meritorious defense. For Plaintiff to have a viable cause of action, Plaintiff has to allege that he has more than a first party complaint against Jays. Plaintiff alleging a first party cause of action against Jays is not possible for relief for Plaintiff. Finally, the Plaintiff is not prejudiced because the delay has been unappreciable. Defendant has appeared in this case since March 22, 2024 and we are not even halfway through the statute of limitations period for an action to be brought (the accident was on March 5, 2023). No further actions have been taken in this case, such as taking depositions or completing discovery, which means relief from default simply allows the parties to now begin to litigate the case on the merits while not retreading old ground.

For the reasons stated herein, good cause exists to allow relief from default and such relief is respectfully requested.

Respectfully submitted,

**SWEENY, WINGATE & BARROW, P.A.**

s/Ryan C. Holt  
Ryan C. Holt, SC Bar No. 78338  
Brian L. Craven, SC Bar 78002  
Sweeny, Wingate & Barrow, P.A.  
Post Office Box 12129  
Columbia, SC 29211  
(803) 256-2233  
**ATTORNEYS FOR DEFENDANT**

Columbia, South Carolina  
August 2, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
Portundo M. Kimble, as Personal	)	
Representative of the Estate of Devon	)	
Enrique Kimble, Deceased,	)	
	)	
Plaintiff,	)	<b>SUMMONS</b>
vs.	)	
	)	
Jays Bar and Grill, LLC	)	
	)	
Defendant.	)	

**TO THE ABOVE-NAMED DEFENDANT:**

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to appear and defend this action by answering the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

Lexington, South Carolina  
June 12, 2023

**BLAND RICHTER, LLP**  
*Attorneys for the Plaintiff*

s/Eric S. Bland  
Eric S. Bland (SC Bar No. 64132)  
105 West Main Street, Suite D  
Lexington, South Carolina 29072  
T: 803.256.9664 F: 803.256.3056  
ericbland@blandrichter.com

s/Ronald L. Richter, Jr  
Ronald L. Richter, Jr. (SC Bar No. 66377)

s/Scott M. Mongillo  
Scott M. Mongillo (SC Bar No. 16574)  
18 Broad Street, Mezzanine  
Charleston, South Carolina, 29401  
T: 843.573.9900 F: 843.573.0200  
ronnie@blandrichter.com  
scott@blandrichter.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,	)	
	)	
	)	
Plaintiff,	)	<b>COMPLAINT</b>
	)	<b>(Wrongful Death and Survival)</b>
vs.	)	
	)	
Jays Bar and Grill, LLC	)	
	)	
	)	
Defendant.	)	<b>JURY TRIAL DEMAND!</b>

COMES NOW Plaintiff, Portundo M. Kimble ("Plaintiff"), duly appointed in Richland County as the Personal Representative of the Estate of Devon Enrique Kimble, deceased ("Decedent"), by and through his undersigned attorneys and complains of the Defendant as follows:

**PARTIES**

1. Plaintiff, as the duly appointed Personal Representative of the Decedent's Estate, has the right and authority to bring this wrongful death action on behalf of Decedent's beneficiaries under the South Carolina Wrongful Death Act, S.C. Code § 15-51-10 *et seq.*, this survival action on behalf of Decedent's Estate under S.C. Code § 15-5-90 *et seq.*, and this civil action for negligence, negligence *per se*, dram shop, and related claims. Plaintiff is a citizen and resident of Blythewood, South Carolina.

2. Decedent was a citizen and resident of Richland County, South Carolina at the time of the collision that took his life.

3. Defendant Jay's Bar and Grill ("Defendant") is a South Carolina corporation having a principal place of business at 902 Gervais Street, Suite D, Columbia, South Carolina, 29205.

**JURISDICTION AND VENUE**

4. The fatal incident that caused the death of the Decedent occurred on March 5, 2023, in Richland County, South Carolina. Furthermore, Defendant owns real and personal property and/or regularly conducts business in Richland County, South Carolina. The acts and omissions by Defendant that caused Decedent's death occurred in Richland County.

5. For these reasons, this Court has personal jurisdiction over the parties to this action and subject matter jurisdiction over the claims asserted in the Complaint and venue is proper.

**STATEMENT OF FACTS**

6. On the night of March 5, 2023, Decedent worked hard and looked forward to meeting friends at Jay's Bar and Grill.

7. Upon information and belief, while at Jay's Bar and Grill, Decedent was served alcohol by Defendant to the point of becoming extremely and visibly intoxicated, in violation of South Carolina law.

8. Upon information and belief, Decedent left Defendant's establishment at approximately 2:00 am. Decedent had been served by the employees of Defendant, acting within the scope of their employment, to a point of gross intoxication.

9. At approximately 2:00 am, Decedent was attempting to drive home when his motor vehicle left the roadway and was involved in a serious single-car accident.

10. The Decedent was killed.

11. His blood alcohol content at the time of the accident was approximately three times the legal limit.

**FOR A FIRST CAUSE OF ACTION**  
*(Negligence and Dram Shop)*

12. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

13. At all relevant times hereto, Defendant sold alcohol at Decedent for profit as a commercial, licensed enterprise. Defendant offered beer, wine, and hard liquor beverages subject to licensing by the State of South Carolina and subject to all applicable statutes and state administrative regulations concerning the sale and consumption of alcohol.

14. Defendant, as a commercial server of intoxicating beverages, owed Decedent a duty not to allow its patrons to become visibly intoxicated, not to serve alcohol to its intoxicated patrons, and to protect Decedent from the possible consequences of his intoxication and he became intoxicated as a result of the alcohol sold by Defendant.

15. Defendant breached these duties by allowing Decedent to become grossly intoxicated and by continuing to serve him more alcohol after they knew or should have known he was intoxicated. Defendant, by and through its employees and agents, served Decedent alcohol while he was intoxicated in violation of the statutory and common law of South Carolina.

16. At all relevant times hereto, Defendant was responsible for the actions of its agents, servants, employees, or managers serving alcohol to any patron, including Decedent. Defendant is both directly and vicariously liable for the conduct complained of herein regarding the actions or inactions and their consequences.

17. On or about the evening hours of March 5, 2023, Defendant through its agents, servants, employees, or managers did serve or provide Decedent a quantity of alcohol which resulted in Decedent becoming extremely intoxicated, and continued to serve him after he became extremely intoxicated.

18. The alcoholic beverages which were sold, provided, and consumed by Decedent by the agents and employees of Defendant, contributed to, or caused Decedent to become and remain intoxicated at all times relevant hereto.

19. Decedent's blood alcohol content at the time of the accident was approximately three times the legal limit prescribed by the laws of the State of South Carolina.

20. Defendant knew or should have known that Decedent had been served alcohol by Defendant's agents, servants, employees, or managers to the point that he was extremely intoxicated and incapable of safely operating a motor vehicle.

21. However, after consuming alcoholic beverages provided by Defendant over the course of a few hours, Decedent, in a grossly intoxicated state, got into his motor vehicle.

22. The intoxication of Decedent, collision, injuries, damages, and death, as described in this Complaint, were the direct, foreseeable and proximate result of the negligent, careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant, and that Defendant was independently, concurrently, and jointly negligent and grossly negligent, willful, and wanton in the following particulars to wit:

- a) Serving alcoholic beverages to Decedent while Decedent was intoxicated;
- b) Allowing Decedent to consume alcoholic beverages to excess on the premises of Defendant;
- c) Allowing Decedent to consume alcoholic beverages to excess and then allowing him to drive a motor vehicle while intoxicated in violation of the laws of the State of South Carolina;
- d) Allowing the service of alcoholic beverages by its agents, servant employees, or managers to Decedent, when Defendant knew or should have known he was intoxicated, in violation of the common law and Sections 61-4-580 and 61-6-2220 of the South Carolina Code of Laws;

- e) Allowing the service of alcoholic beverages by its agents, servant employees, or managers to Decedent, in an amount enabling him to become intoxicated, in violation of the common law and statutory laws of the State of South Carolina;
- f) Failing to appreciate Decedent's intoxication while permitting him to continue to be served and consume alcoholic beverages while on the premises of Defendant, and in failing to provide Decedent a safe means of transportation;
- g) Failing to ensure that after allowing alcohol to be served to, and consumed by, Decedent, that he would not drive upon the roadways of the State of South Carolina;
- h) Failing to properly and adequately supervise their agents, servant employees, or managers with regard to the service to and consumption of alcohol by Decedent while on the premises of Defendant;
- i) Failing to implement or maintain policies and procedures that would ensure that its agents, servants, employees, or managers would not serve its customers, such as Decedent, once they became intoxicated;
- j) Deviating from the accepted standard of care in allowing its agents, servants, employees, or managers to continue to serve its customers after they were intoxicated;
- k) Failing to have a policy, or failed to enforce their policy, that no agents, servants, employees, or managers were allowed to serve customers alcohol after they were intoxicated;
- l) Violating state statutes and regulations that concern the sale and service of alcohol and that Defendant violated those statutes and regulations;
- m) Serving alcoholic beverages to Decedent when Defendant knew or should have known the amount would make Decedent intoxicated and served Decedent alcohol while he was intoxicated in violation of common law and South Carolina law;
- n) After serving Decedent when Defendant knew or should have known Decedent was intoxicated Defendant failed to ensure a safe means of transportation for Decedent and failed to ensure that Decedent would not drive upon the roadways of Columbia, South Carolina;
- o) Failing to properly and adequately train and qualify its employees in regard to their duties and responsibilities for the service of alcohol;
- p) Failing to monitor the activities of its employees resulting in improper service of

alcohol;

- q) Deviating from the standard of care in the training and supervision of employees in the service of alcohol; and
- r) Creating an atmosphere of encouragement, tolerance, and acquiescence allowing employees to serve alcohol to customers after they were intoxicated which created a dangerous and unsafe environment resulting in Decedent's extreme intoxication and subsequent collision.

All such acts and omissions, or both, were the actual, direct and proximate cause of the damages, injuries and death claimed herein.

23. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.

24. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, the Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

25. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant as set out above, as well as its violation of state law, Plaintiff is entitled to recover

actual and punitive damages, jointly and severally, as determined by a jury.

**FOR A SECOND CAUSE OF ACTION**

*(Negligence Per Se)*

26. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

27. Defendant permitted, enabled, and condoned Decedent to purchase or obtain and be served alcoholic beverages that he consumed on the premises of Defendant, which resulted in Decedent becoming intoxicated.

28. That upon Decedent becoming intoxicated, Defendant continued to permit, enable, and condone the additional purchase and/or consumption and service of alcoholic beverages to Decedent, which he consumed on the premises of Defendant.

29. That Defendant permitting, enabling, and condoning the continued purchase, service, and/or consumption of alcoholic beverages by Decedent while he was in a state of intoxication is a violation of Sections 61-4-580 and 61-6-2220 of the South Carolina Code of Laws. Decedent was a member of the class of persons that the cited statutes are specifically intended to protect.

30. That the said violation of the noted statutes by Defendant constitutes *negligence per se*, and is evidence of reckless, willful, and wanton conduct and was one of the contributing causes of Decedent's death.

31. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental

shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.

32. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

33. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of the Defendant as set out above, as well as their violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

**FOR A THIRD CAUSE OF ACTION**

*(Negligent Hiring, Training, Supervision, and Retention)*

34. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

35. At all relevant times hereto, Defendant was responsible for the hiring, training, supervision, and retention of its agents, servants, employees, and managers.

36. Defendant owed statutory and common law duties to the Decedent not to negligently hire, train, supervise, and retain employees.

37. At all times material to this Complaint, Defendant knew, or had reason to know, that it had the ability and obligation to control and supervise its agents, servants, employees, and managers.

38. Defendant knew, or had reason to know, that its customers were likely to be

served and consume alcoholic beverages on the premises of Defendant, to the point of intoxication, and then drive while intoxicated, putting third persons at risk of sustaining injury or death.

39. Defendant knew, or had reason to know, of the necessity and opportunity for exercising control and supervision over its agents, servants, employees, and managers, so that third persons would not be put at risk of sustaining injury and death.

40. Defendant, having full knowledge of the noted propensities of its agents, servants, employees, and managers, negligently, carelessly, recklessly, willfully, and wantonly hired, trained, retained, and supervised them in the conduct and performance of their various employment duties on Defendant's premises.

41. As a proximate result of Defendant's negligent, careless, grossly negligent, reckless, willful, and wanton hiring, training, retention, and supervision of its agents, servants, employees, and managers, Decedent left the premises of Defendant on March 5, 2023, and proceeded to drive a motor vehicle in a dangerous and unsafe manner while extremely intoxicated.

42. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs

of himself and his beneficiaries.

43. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

44. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant as set out above, as well as its violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

WHEREFORE, having stated its factual allegations and causes of action against Defendant, the Personal Representative prays for the following:

- i. A trial by jury;
- ii. Judgment against Defendant for actual, consequential and punitive damages pled herein in an amount to be determined by the jury;
- iii. For the costs of this action; and
- iv. For such other and further relief as this court deems just and proper.

Lexington, South Carolina  
June 12, 2023

**BLAND RICHTER, LLP**  
*Attorneys for the Plaintiff*

s/Eric S. Bland  
Eric S. Bland (SC Bar No. 64132)  
105 West Main Street, Suite D  
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s/Ronald L. Richter, Jr

Ronald L. Richter, Jr. (SC Bar No. 66377)

s/Scott M. Mongillo

Scott M. Mongillo (SC Bar No. 16574)

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ELI ELECTRONICALLY FILED - 2023 AUG 31 10 02 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052

**AFFIDAVIT OF NON-SERVICE**

State of South Carolina

County of Richland

Common Pleas Court

Case Number: 2023-CP-40-3052

Plaintiff:

**Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,**

vs.

Defendant:

**Jays Bar and Grill, LLC**

For:

Bland Richter LLP  
105 West Main Street, Suite D  
Lexington, SC 29072

Received by Milligan & Associates LLC to be served on **JAYS BAR AND GRILL LLC c/o Jay Kalin, Jr Registered Agent, 104 High Circle 8 B, Myrtle Beach, SC 29572.**

I, Roger Turner, being duly sworn, depose and say that on the **13th day of June, 2023 at 12:15 pm, I:**

**NON-SERVED:** After due search, careful inquiry and diligent attempts I was unable to serve the **Summons and Complaint** for the reason that, **RENTAL PROEPRTY OWNED BY THE DEFENDANT - WHEREABOUTS UNK PER OCCUPANT** ,or information to allow further search.

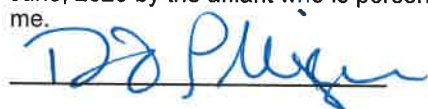
I certify that I am over the age of 18, have no interest in the above action, and in good standing, in the judicial circuit in which the process was served.



**Roger Turner**  
Process Server

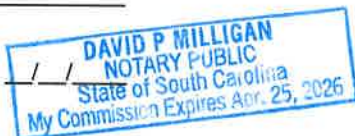
**Milligan & Associates LLC**  
Process@MilliganAndAssociates.com  
P.O. Box 4845  
Florence, SC 29502-4845  
(843) 667-4747

Subscribed and Sworn to before me on the 14th day of June, 2023 by the affiant who is personally known to me.



PRINT NAME

NOTARY PUBLIC



Our Job Serial Number: DPM-2023000360  
Ref: Kimble v. Jays Bar

# STATE OF SOUTH CAROLINA

## AFFIDAVIT OF DILIGENT SEARCH

**RICHLAND COUNTY**

**COURT OF, COMMON PLEAS**

**DOCKET # 2023-CP-40-3052**

**PORTUNDO M. KIMBLE, A PERSONAL REPRESENTATIVE OF**

**THE ESTATE OF DEVON ENRIQUE KIMBLE, DECEASED**

**-VS-**

**JAYS BAR AND GRILL, LLC**

**THE UNDERSIGNED, JEFF COSTNER, BEING DULY SWORN STATES HE ATTEMPTED SERVICE ON THE FOLLOWING DOCUMENTS : (1) SUMMONS (2) COMPLAINT (3) PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT (4) PLAINTIFF'S FIRST REQUEST FOR PRODUCTION TO DEFENDANT**

**IN THE FOREGOING ACTION ON : JAYS BAR AND GRILL, LLC**

**AFTER A DILIGENT SEARCH THIS PERSON CANNOT BE LOCATED AND THE PROCESS SERVER STATES HE HAS ATTEMPTED SERVICE ON THE FOLLOWING DATES, TIMES AND ADDRESSES.**

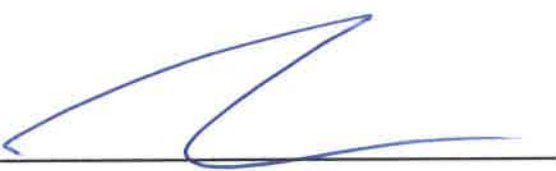
**THE SERVER, JEFF COSTNER HAS MADE THE FOLLOWING ATTEMPTS TO SERVE A JAY KALIN, JR, WHO IS THE REGISTERED AGENT FOR SERVICE FOR JAYS BAR AND GRILL, LLC AT THE BUSINESS LOCATION AT, 902 GERVAIS STREET, SUITE D, COLUMBIA, SOUTH CAROLINA 29201, ON JUNE 20, 2023, AT 8:45 am, THE SERVER WAS TOLD HE WAS NOT THERE, MAY BE IN LATE THAT AFTERNOON, ATTEMPTED AGAIN ON JUNE 20, 2023 AT 4:40 pm, SERVER WAS TOLD HE IS NOT THERE, AND WAS NOT COMING IN THAT DAY, ATTEMPTED ON JUNE 21, 2023 AT 5:10 pm, THE SERVER WAS TOLD HE IS NOT THERE AND HE WAS TOLD THEY DID NOT KNOW IF HE WAS COMING IN OR NOT. ATTEMPTED ON JUNE 22, 2023 AT 5:00 pm, THE SERVER WAS TOLD HE WAS NOT THERE. THE SERVER HAS NOTICES THAT THERE IS USUALLY A BLACK PORSCHE IN THE BACK PARKING LOT ON SEVERAL OCCASIONS, WHEN ATTEMPTED AND BELIEVED TO BE THE VEHICLE THAT JAY KALIN JR DRIVES, ATTEMPTED ON JULY 05, 2023 AT 9:00 am, THE FRONT DOOR WAS OPEN AT THE RESTAURANT, THE SERVER HOLLERED SEVERAL TIMES AND WAS UNABLE TO GET ANYONE TO COME UP TO THE BAR AREA. ATTEMPTED ON JULY 06, 2023 AT 8:10 pm, A WHITE MALE AT THE FRONT GATE TOLD THE SERVER HE WAS NOT THERE, ATTEMPTED SERVICE AGAIN ON JULY 14, 2023 AT 10:00 am, THE BLACK PORSCHE WAS IN THE BACK BUT THE SERVER WAS TOLD BY A BLACK MALE HE WAS**


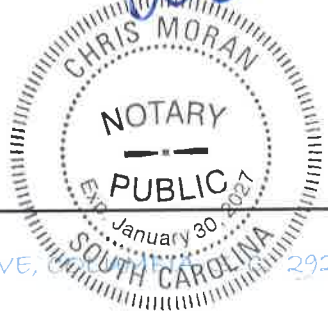
FILED FOR RECORD IN THE CLERK OF COURT'S OFFICE, RICHLAND COUNTY, SOUTH CAROLINA, ON 07/14/2023 AT 10:00 AM. BY: JEFF COSTNER, PROCESS SERVER. JEFF COSTNER, 1000 W. MAIN ST., COLUMBIA, SC 29201. TEL: 803-733-1111. FAX: 803-733-1112.

NOT IN TODAY. ATTEMPTED ON JULY21, 2023 AT 3:30 pm, AND WAITED UNTIL 5:10 pm, A BLACK MALE CAME OUT AND TOLD THE SERVER HE WAS NOT COMING IN TODAY.

THE SERVER HAS ALSO ATTEMPTED A SECOND ADDRESS AT, 621 GADSDEN STREET, SUITE A, COLUMBIA, SOUTH CAROLINA 29201, THIS ADDRESS IS JAY'S VAPE SHOP, A WHITE MALE TOLD THE SERVER THAT HE IS USALY NOT AT THIS ADDRESS, JUST ONCE IN A WHILE. THE SERVER HAS LEFT A BUSINESS CARD WITH EMPLOYEES SEVERAL TIMES WITH NO RETURN CALLS. THE SERVER HAS SEARCHED FOR ANY OTHER ADDRESSES, SOCIAL MEDIA AND HAS NOT LOCATED ANYTHING BUT THE BUSINESS LOCATION.

  
\*\* JEFF COSTNER – PROCESS SERVER \*\*

  
SWORN BEFORE ME THIS, 23rd DAY OF, JULY 2023  
MY COMMISSION EXPIRES : 1.30.27

COSTNER'S LEGAL SERVICE, 2109 KATHLEEN DRIVE, SOUTH CAROLINA 29210

FILED FOR RECORD IN COUNTY OF KATHLEEN DRIVE - 2023 JULY 23 10:30 AM - FRI JUL 21 2023 - COMMISSIONER OF RECORDS - 2023 JULY 23 10:30 AM - 2023 JULY 23 10:30 AM

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CIVIL ACTION NUMBER: 2023-CP-40-03052

Portundo M. Kimble, as Personal	)
Representative of the Estate of Devon	)
Enrique Kimble, Deceased,	)

**ORDER FOR PUBLICATION**

	)
Plaintiff,	)

vs.	)
-----	---

Jays Bar and Grill, LLC,	)
--------------------------	---

	)
Defendant.	)

Having read and filed the Petition for Service of Publication by Bland Richter, LLP, attorney for the plaintiff, and it appearing that the Registered Agent for Defendant Jays Bar and Grill, LLC cannot, after due diligence, be located in Richland County, South Carolina nor Horry County South Carolina (address listed with Secretary of State), and it further appearing that a cause of action exists against said defendant,

NOW, THEREFORE, upon motion of Bland Richter, LLP;

IT IS ORDERED that service in this matter be made on defendant Jays Bar and Grill, LLC by publishing a copy of the Summons and Complaint in the Columbia Free Times, which this court feels to be the newspaper most likely to give notice to said defendant, with said Summons and Notice of filing of Complaint to be published once weekly for three (3) consecutive weeks.

**(SIGNATURE PAGE OF CLERK OF COURT ON FOLLOWING PAGE)**

FILED ELECTRONICALLY FILED -- 2023 AUG 02 10 24 AM -- RICHLAND -- COMMON PLEAS -- CASE#2023CP4003052



Richland Common Pleas

**Case Caption:** Portundo M Kimble , plaintiff, et al vs Jays Bar And Grill Llc

**Case Number:** 2023CP4003052

**Type:** Order/Publication

So Ordered

s/Jeanette W. McBride by Brandy Metts

Electronically signed on 2023-08-01 08:24:21 page 2 of 2

ELECTRONICALLY FILED -- 2023 AUG 01 08:24 AM -- RICHLAND -- COMMON PLEAS -- CASE#2023CP4003052

ROA-0167

Mary-Ellen Shirley Bland Richter, LLP  
105 WEST MAIN ST. SUITE D  
LEXINGTON SC 29072

# AFFIDAVIT OF PUBLICATION



State of South Carolina  
County of Richland

Personally appeared before me the undersigned advertising clerk of the above indicated newspaper published in the city of Columbia, county and state aforesaid, who, being duly sworn, says that the advertisement of

(copy attached)

appeared in the issues of said newspaper on the following day(s):

- 08/09/23 Wed FT
- 08/16/23 Wed FT
- 08/23/23 Wed FT

at a cost of **\$114.00**  
Account# **370315**  
Order# **2050245**  
P.O. Number:

Subscribed and sworn to before me this 23<sup>rd</sup> day of August A.D. 2023

NOTARY PUBLIC, SC  
My commission expires

advertising clerk

State of South Carolina  
County of Richland  
In the Court of Common Pleas  
For the Fifth Judicial Circuit  
Civil Action Number: 2023-CP-40-03052  
  
Portourido M. Kimble as Personal Representative of the Estate of Enrique Kimble, Deceased vs. Jays Bar and Grill, LLC  
  
TO Jay Kalin, Jr., Registered Agent for Jays Bar and Grill, LLC and Jays Bar and Grill, LLC  
  
YOU ARE HEREBY SUMMONED and required to answer the Complaint in this

action, which was filed on June 12, 2023 and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service by publication hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the complaint.  
  
Eric S. Bland, Esc.  
Bland Richter, LLP  
105 West Main Street, Suite D  
Lexington, SC 29072



**LINKS**  
CALENDAR    VIP SERVICE  
GENERAL INQUIRES    EVENT RENTAL  
CAREERS    MENU

**CONTACT**  
DM @JAYSBARCOLUMBIA ON INSTAGRAM  
(803) 391-0777 **(BUSINESS HOURS ONLY)**  
**(PLEASE TEXT IF NO RESPONSE)**

Jay's Bar & Grill  
902 Gervais St, Columbia  
South Carolina, 29205

**JAY'S BAR & GRILL**  
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8:00PM - 2:00AM

**JAY'S KITCHEN**  
Monday - Sunday  
8PM - 1AM

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF RICHLAND ) THE FIFTH JUDICIAL CIRCUIT

Portundo M. Kimble, as Personal ) Civil Action No.: 2023CP4003052  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )  
 )  
Plaintiff, )

v. )

MOTION TO ALTER OR  
AMEND A JUDGMENT  
(Rule 59(e), SCRCP)

Jays Bar and Grill, LLC, )  
 )  
 )  
 )  
Defendant. )

**TO: THE PLAINTIFF AND HER ATTORNEYS BLAND RICHTER:**

COMES NOW, Defendant Jays Bar and Grill, LLC, who will move the Court of Common Pleas for the Fifth Circuit at the Richland County Courthouse on a date to be set by the Clerk of Court to reconsider its Order of August 20, 2024 denying relief from entry of default. This motion is made pursuant to Rule 59(e), SCRCP.

**NATURE OF CASE**

This action alleges overservice of alcohol and a subsequent car crash in which Plaintiff's Decedent was killed.

**FACTUAL AND PROCEDURAL HISTORY**

Plaintiff's Decedent allegedly visited Jays on March 5, 2023, consumed alcohol, and became extremely intoxicated. Compl. ¶¶ 6-7 (Ex. 1). At approximately 2:00 a.m., Decedent left Jays and drove a vehicle. Compl. ¶¶ 8-9. While driving, Decedent was involved in a single-car accident, resulting in the Plaintiff's death. Compl. ¶¶ 9-10.

Plaintiff brought this action against Jays on June 12, 2023. *See* Compl. Plaintiff alleges negligence, negligence per se, and negligent hiring, training, supervision, and retention against Jays. *See* Compl. Plaintiff attempted to serve Jays' registered agent, Jay Kalin, Jr., at an address in Myrtle Beach, South Carolina but was unsuccessful. Pl.'s Aff. of Non-Service (Ex. 2). Thereafter, Plaintiff attempted to serve Kalin at Jays several times but was unsuccessful. Pl.'s Aff. of Diligent Search (Ex. 3). Then, Plaintiff obtained an order for publication and submitted a publication about the summons and complaint in *The Free Times* on August 9, 2023, August 16, 2023, and August 23, 2023. *See* Order for Publication (Ex. 4); Pl.'s Aff. of Publication (Ex. 5).

Plaintiff moved for entry of default and default judgment on October 5, 2023. The Clerk of Court entered default on October 6, 2023. Plaintiff moved for a damages hearing on October 9, 2023. Defense counsel entered a notice of appearance on March 7, 2024. Shortly thereafter, Defense counsel entered into conversations with Plaintiff's counsel about setting the default aside. On March 15, 2024, Plaintiff's counsel stated that he was "inclined to open the default." *See* Email (Ex. 6). However, Plaintiff's counsel eventually reversed course, necessitating the filing of Defendant's motion to set aside default on March 22, 2024. On August 5, 2024, the Court heard arguments on the motion and entered an order denying the motion on August 20, 2024. This Motion follows.

### **LEGAL STANDARD**

"Rule 55(c) should be 'liberally construed to promote justice.'" *Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008) (citation omitted). In *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009), the Supreme Court detailed the applicable standard for a motion to be relieved from default:

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." This standard requires a party seeking relief from an entry of

default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.

383 S.C. at 607-08, 681 S.E.2d at 888 (quoting Rule 55(c)).

“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”

*Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)

### **LEGAL ARGUMENT**

#### **I. Good cause exists to grant Jays relief from default.**

In this matter, good cause exists to grant Jays relief from default because the publication order was improvidently granted. The Plaintiff’s own filings of non-service bear this assertion out. Service by publication was not warranted in this case because it did not meet the dictates of § 15-9-710 of the South Carolina Code, which governs when service by publication may be had. Section 15-9-710 permits an order of publication when the following three requirements are met:

1. “the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State”;
2. “a cause of action exists against the defendant in respect to whom the service is to be made”; and
3. “the defendant is a resident of this State and after a diligent search cannot be found”

Part of the third requirement has been met. Defendant is a domestic corporation. The remaining requirements have not been met.

**A. Plaintiff's search for Defendant was not diligent.**

Defendant respectfully asks the Court to reconsider its conclusion that Plaintiff's search for Defendant was not diligent. The Court did not articulate in its August 20 Order why the search was diligent. It is clear from Paragraph 2(a) of the Order that the Court considered only the *number* of service attempts in concluding diligence, rather than Defendant's argument that the number is immaterial if the person to be served cannot be found there. For instance, the Court failed to account for the reality that *six* of seven of the Plaintiff's service attempts were made outside of Defendant's business hours. The final attempt was made only in the first hour of Defendant's business when it is not busy.

Moreover, the Court failed to address the argument made by Defendant that the proper person to be served is Defendant's registered agent, who designated a Myrtle Beach address with the Secretary of State which Plaintiff only attempted to serve once. One service attempt is far from diligent. Additionally, multiple service attempts in Columbia without any indication that the registered agent would be present are likewise not diligent.

This is further established from the affidavit of Jay Kalin. *See* Ex. 7. Kalin, despite being the registered agent for Defendant, was never served with the Complaint. *Id.* ¶3, 4. Plaintiff's process server appears to have made just one attempt at the family residence of Kalin before giving up. *Id.* ¶6-7. Indeed, no one at the residence was ever served with the Complaint. *Id.* With respect to the Columbia service attempts (argued against, *supra*), the suggestion by Plaintiff's counsel at the hearing that the presence of Kalin's vehicle suggested evasion of service is unsupported by any evidence. To the contrary, Kalin will often leave the vehicle in the parking

lot for days at a time. *Id.* ¶8-10. The only evidence before this Court concerning diligence is to the contrary, i.e. that the service efforts were not diligent. Plaintiff failed to establish that he made diligent efforts at service, as shown by the Kalin Affidavit and other evidence discussed herein, and therefore he should have never been issued an Order of Publication.

**B. No cause of action exists to warrant an order of publication.**

The Court’s Order denying relief from default failed to consider at all Defendant’s primary argument—no cause of action exists and therefore an Order of Publication was *per se* invalid according to the governing statute. Section 15-9-710 requires a cause of action to exist before an order of publication is warranted: “a cause of action exists against the defendant in respect to whom the service is to be made.”

Just because a Plaintiff files suit does not a cause of action make. If a plaintiff sues a defendant for having blue hair, and the defendant fails to answer, should the defendant be liable for a default judgment (which in South Carolina, tend to be well into the seven-figures)? By its order, the Court has paved the way for the Plaintiff to recover under a cause of action our State has specifically declined to recognize. The South Carolina Supreme Court has specifically declined to allow first party causes of action in dram shop cases. *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 91, 504 S.E.2d 318, 319 (1990) (“We now join the majority of jurisdictions that have addressed this issue, and hold that South Carolina does not recognize a ‘first party’ cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of [S.C. Code Ann. §§ 61-4-580(2)] and/or [61-6-2220].”). The Supreme Court is clear that “public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct.” *Id.* at 92, 504 S.E.2d at 319-20. Plaintiff filed a negligence cause of action against Jays alleging Jays violated South Carolina Code sections 61-4-580 and 6-16-

2220. However, Plaintiff's Decedent was involved in a single-car crash, and Jays cannot be responsible for Plaintiff's own conduct.

The only way Plaintiff could prevail in this case is with a default judgment. Absent a default, Plaintiff would not be able to sustain a cause of action. A first party cause of action against Jays on behalf of Plaintiff cannot exist. Without a viable cause of action, Plaintiff's order of publication does not meet the statute requirements and is not effective. Moreover, the absence of a cause of action satisfies the meritorious defense requirements of Rule 55(c), SCRCP. The Court did not consider this argument, and did not rule upon it. Therefore, pursuant to Rule 59(e), Defendant asks that it be considered and ruled upon.

**C. Plaintiff failed to comply with the requirements for service by publication as presented in the applicable statutes.**

The Court did not articulate why publication in a Richland County newspaper, rather than an Horry County newspaper, was proper even though the registered agent is listed with the Secretary of State as having an address in Horry County. Defendant respectfully requests the Court to rule on why the publication in Columbia "was proper" as stated in the Order.

Service by publication was defective in this case because it did not meet the dictates of § 15-9-740 of the South Carolina Code which governs service by publication. Section § 15-9-740 states in part:

The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, **most likely to give notice to the person to be served** and for such length of time as may be deemed reasonable not less than once a week for three weeks.

S.C. Code Ann. § 15-9-740 (emphasis added). In *Hopkins v. Brown*, No. 2006-UP-276, 2006 WL 7286059, at \*3 (S.C. Ct. App. June 8, 2006), the Court of Appeals determined that service by publication of general circulation should be in the county where the person to be served was last

known to reside to comply with S.C. Code Ann. § 15-9-740. *Hopkins v. Brown*, No. 2006-UP-276, 2006 WL 7286059, at \*3 (S.C. Ct. App. June 8, 2006).

In this case, notice was placed in the *Columbia Free Times* for three consecutive weeks. The *Free Times* is not the publication that should have been used. First, while Jays is located in Richland County, Kalin is listed as the registered agent with an address in Horry County. *See* Pl.'s Aff. of Non-Service. Second, the *Columbia Free Times* only posts news about Columbia and the Richland County community. Therefore, it does not have large enough circulation to afford Jays its due process rights because its registered agent, Kalin, is associated with an Horry County address.

**II. The specifically enumerated considerations required by the Court in analyzing a Rule 55(c) motion weigh in favor of Jays.**

“Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.” *Sundown Operating Co.*, 383 S.C. at 607-08, 681 S.E.2d at 888.

The Court did not conduct this analysis. Jays moved immediately to respond to the Plaintiff's legal proceedings once notified of them on March 4, 2024, including informing its insurance carrier and cooperating with counsel. Within days, counsel for Jays filed the corresponding motion for relief. Jays also has a meritorious defense. For Plaintiff to have a viable cause of action, Plaintiff must allege that he has more than a first party complaint against Jays. Plaintiff alleging a first party cause of action against Jays is not possible for relief for Plaintiff. Finally, the Plaintiff is not prejudiced because the delay has been unappreciable. Defendant has appeared in this case since March 22, 2024 and we are not even halfway through the statute of limitations period for an action to be brought (the accident was on March 5, 2023).

No further actions have been taken in this case, such as taking depositions or completing discovery, which means relief from default simply allows the parties to now begin to litigate the case on the merits while not retreading old ground.

For the reasons stated herein, good cause exists to allow relief from default and such relief is respectfully requested. Defendant respectfully requests that the Court reconsider its Order denying the motion to set aside for the aforementioned reasons.

Respectfully submitted,

**SWEENY, WINGATE & BARROW, P.A.**

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**ATTORNEYS FOR DEFENDANT**

Columbia, South Carolina  
August 29, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,	)	
	)	
Plaintiff,	)	<b>SUMMONS</b>
vs.	)	
	)	
Jays Bar and Grill, LLC	)	
	)	
Defendant.	)	

**TO THE ABOVE-NAMED DEFENDANT:**

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to appear and defend this action by answering the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

Lexington, South Carolina  
June 12, 2023

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND )  
  
Portundo M. Kimble, as Personal )  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )  
 )  
Plaintiff, ) **COMPLAINT**  
 ) **(Wrongful Death and Survival)**  
vs. )  
 )  
Jays Bar and Grill, LLC )  
 )  
 )  
Defendant. ) **JURY TRIAL DEMAND!**

COMES NOW Plaintiff, Portundo M. Kimble ("Plaintiff"), duly appointed in Richland County as the Personal Representative of the Estate of Devon Enrique Kimble, deceased ("Decedent"), by and through his undersigned attorneys and complains of the Defendant as follows:

**PARTIES**

1. Plaintiff, as the duly appointed Personal Representative of the Decedent's Estate, has the right and authority to bring this wrongful death action on behalf of Decedent's beneficiaries under the South Carolina Wrongful Death Act, S.C. Code § 15-51-10 *et seq.*, this survival action on behalf of Decedent's Estate under S.C. Code § 15-5-90 *et seq.*, and this civil action for negligence, negligence *per se*, dram shop, and related claims. Plaintiff is a citizen and resident of Blythewood, South Carolina.

2. Decedent was a citizen and resident of Richland County, South Carolina at the time of the collision that took his life.

3. Defendant Jay's Bar and Grill ("Defendant") is a South Carolina corporation having a principal place of business at 902 Gervais Street, Suite D, Columbia, South Carolina, 29205.

### **JURISDICTION AND VENUE**

4. The fatal incident that caused the death of the Decedent occurred on March 5, 2023, in Richland County, South Carolina. Furthermore, Defendant owns real and personal property and/or regularly conducts business in Richland County, South Carolina. The acts and omissions by Defendant that caused Decedent's death occurred in Richland County.

5. For these reasons, this Court has personal jurisdiction over the parties to this action and subject matter jurisdiction over the claims asserted in the Complaint and venue is proper.

### **STATEMENT OF FACTS**

6. On the night of March 5, 2023, Decedent worked hard and looked forward to meeting friends at Jay's Bar and Grill.

7. Upon information and belief, while at Jay's Bar and Grill, Decedent was served alcohol by Defendant to the point of becoming extremely and visibly intoxicated, in violation of South Carolina law.

8. Upon information and belief, Decedent left Defendant's establishment at approximately 2:00 am. Decedent had been served by the employees of Defendant, acting within the scope of their employment, to a point of gross intoxication.

9. At approximately 2:00 am, Decedent was attempting to drive home when his motor vehicle left the roadway and was involved in a serious single-car accident.

10. The Decedent was killed.

11. His blood alcohol content at the time of the accident was approximately three times the legal limit.

**FOR A FIRST CAUSE OF ACTION**  
*(Negligence and Dram Shop)*

12. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

13. At all relevant times hereto, Defendant sold alcohol at Decedent for profit as a commercial, licensed enterprise. Defendant offered beer, wine, and hard liquor beverages subject to licensing by the State of South Carolina and subject to all applicable statutes and state administrative regulations concerning the sale and consumption of alcohol.

14. Defendant, as a commercial server of intoxicating beverages, owed Decedent a duty not to allow its patrons to become visibly intoxicated, not to serve alcohol to its intoxicated patrons, and to protect Decedent from the possible consequences of his intoxication and he became intoxicated as a result of the alcohol sold by Defendant.

15. Defendant breached these duties by allowing Decedent to become grossly intoxicated and by continuing to serve him more alcohol after they knew or should have known he was intoxicated. Defendant, by and through its employees and agents, served Decedent alcohol while he was intoxicated in violation of the statutory and common law of South Carolina.

16. At all relevant times hereto, Defendant was responsible for the actions of its agents, servants, employees, or managers serving alcohol to any patron, including Decedent. Defendant is both directly and vicariously liable for the conduct complained of herein regarding the actions or inactions and their consequences.

17. On or about the evening hours of March 5, 2023, Defendant through its agents, servants, employees, or managers did serve or provide Decedent a quantity of alcohol which resulted in Decedent becoming extremely intoxicated, and continued to serve him after he became extremely intoxicated.

18. The alcoholic beverages which were sold, provided, and consumed by Decedent by the agents and employees of Defendant, contributed to, or caused Decedent to become and remain intoxicated at all times relevant hereto.

19. Decedent's blood alcohol content at the time of the accident was approximately three times the legal limit prescribed by the laws of the State of South Carolina.

20. Defendant knew or should have known that Decedent had been served alcohol by Defendant's agents, servants, employees, or managers to the point that he was extremely intoxicated and incapable of safely operating a motor vehicle.

21. However, after consuming alcoholic beverages provided by Defendant over the course of a few hours, Decedent, in a grossly intoxicated state, got into his motor vehicle.

22. The intoxication of Decedent, collision, injuries, damages, and death, as described in this Complaint, were the direct, foreseeable and proximate result of the negligent, careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant, and that Defendant was independently, concurrently, and jointly negligent and grossly negligent, willful, and wanton in the following particulars to wit:

- a) Serving alcoholic beverages to Decedent while Decedent was intoxicated;
- b) Allowing Decedent to consume alcoholic beverages to excess on the premises of Defendant;
- c) Allowing Decedent to consume alcoholic beverages to excess and then allowing him to drive a motor vehicle while intoxicated in violation of the laws of the State of South Carolina;
- d) Allowing the service of alcoholic beverages by its agents, servant employees, or managers to Decedent, when Defendant knew or should have known he was intoxicated, in violation of the common law and Sections 61-4-580 and 61-6-2220 of the South Carolina Code of Laws;

- e) Allowing the service of alcoholic beverages by its agents, servant employees, or managers to Decedent, in an amount enabling him to become intoxicated, in violation of the common law and statutory laws of the State of South Carolina;
- f) Failing to appreciate Decedent's intoxication while permitting him to continue to be served and consume alcoholic beverages while on the premises of Defendant, and in failing to provide Decedent a safe means of transportation;
- g) Failing to ensure that after allowing alcohol to be served to, and consumed by, Decedent, that he would not drive upon the roadways of the State of South Carolina;
- h) Failing to properly and adequately supervise their agents, servant employees, or managers with regard to the service to and consumption of alcohol by Decedent while on the premises of Defendant;
- i) Failing to implement or maintain policies and procedures that would ensure that its agents, servants, employees, or managers would not serve its customers, such as Decedent, once they became intoxicated;
- j) Deviating from the accepted standard of care in allowing its agents, servants, employees, or managers to continue to serve its customers after they were intoxicated;
- k) Failing to have a policy, or failed to enforce their policy, that no agents, servants, employees, or managers were allowed to serve customers alcohol after they were intoxicated;
- l) Violating state statutes and regulations that concern the sale and service of alcohol and that Defendant violated those statutes and regulations;
- m) Serving alcoholic beverages to Decedent when Defendant knew or should have known the amount would make Decedent intoxicated and served Decedent alcohol while he was intoxicated in violation of common law and South Carolina law;
- n) After serving Decedent when Defendant knew or should have known Decedent was intoxicated Defendant failed to ensure a safe means of transportation for Decedent and failed to ensure that Decedent would not drive upon the roadways of Columbia, South Carolina;
- o) Failing to properly and adequately train and qualify its employees in regard to their duties and responsibilities for the service of alcohol;
- p) Failing to monitor the activities of its employees resulting in improper service of

alcohol;

- q) Deviating from the standard of care in the training and supervision of employees in the service of alcohol; and
- r) Creating an atmosphere of encouragement, tolerance, and acquiescence allowing employees to serve alcohol to customers after they were intoxicated which created a dangerous and unsafe environment resulting in Decedent's extreme intoxication and subsequent collision.

All such acts and omissions, or both, were the actual, direct and proximate cause of the damages, injuries and death claimed herein.

23. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.

24. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, the Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

25. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant as set out above, as well as its violation of state law, Plaintiff is entitled to recover

actual and punitive damages, jointly and severally, as determined by a jury.

**FOR A SECOND CAUSE OF ACTION**

*(Negligence Per Se)*

26. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

27. Defendant permitted, enabled, and condoned Decedent to purchase or obtain and be served alcoholic beverages that he consumed on the premises of Defendant, which resulted in Decedent becoming intoxicated.

28. That upon Decedent becoming intoxicated, Defendant continued to permit, enable, and condone the additional purchase and/or consumption and service of alcoholic beverages to Decedent, which he consumed on the premises of Defendant.

29. That Defendant permitting, enabling, and condoning the continued purchase, service, and/or consumption of alcoholic beverages by Decedent while he was in a state of intoxication is a violation of Sections 61-4-580 and 61-6-2220 of the South Carolina Code of Laws. Decedent was a member of the class of persons that the cited statutes are specifically intended to protect.

30. That the said violation of the noted statutes by Defendant constitutes *negligence per se*, and is evidence of reckless, willful, and wanton conduct and was one of the contributing causes of Decedent's death.

31. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental

shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.

32. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

33. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of the Defendant as set out above, as well as their violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

**FOR A THIRD CAUSE OF ACTION**

*(Negligent Hiring, Training, Supervision, and Retention)*

34. Plaintiff realleges and reincorporates the above paragraphs as if fully set forth herein verbatim.

35. At all relevant times hereto, Defendant was responsible for the hiring, training, supervision, and retention of its agents, servants, employees, and managers.

36. Defendant owed statutory and common law duties to the Decedent not to negligently hire, train, supervise, and retain employees.

37. At all times material to this Complaint, Defendant knew, or had reason to know, that it had the ability and obligation to control and supervise its agents, servants, employees, and managers.

38. Defendant knew, or had reason to know, that its customers were likely to be

served and consume alcoholic beverages on the premises of Defendant, to the point of intoxication, and then drive while intoxicated, putting third persons at risk of sustaining injury or death.

39. Defendant knew, or had reason to know, of the necessity and opportunity for exercising control and supervision over its agents, servants, employees, and managers, so that third persons would not be put at risk of sustaining injury and death.

40. Defendant, having full knowledge of the noted propensities of its agents, servants, employees, and managers, negligently, carelessly, recklessly, willfully, and wantonly hired, trained, retained, and supervised them in the conduct and performance of their various employment duties on Defendant's premises.

41. As a proximate result of Defendant's negligent, careless, grossly negligent, reckless, willful, and wanton hiring, training, retention, and supervision of its agents, servants, employees, and managers, Decedent left the premises of Defendant on March 5, 2023, and proceeded to drive a motor vehicle in a dangerous and unsafe manner while extremely intoxicated.

42. As a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent's beneficiaries, whose interests are being properly pursued by Plaintiff as Decedent's Personal Representative, have suffered injuries. These injuries have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim: (a) pecuniary loss; (b) mental shock and suffering; (c) wounded feelings; (d) grief and sorrow; (e) loss of companionship; and (f) deprivation of use and comfort of Decedent's society, including loss of his experience, knowledge, and judgment in managing the affairs

of himself and his beneficiaries.

43. In addition, as a direct and proximate result of Defendant's willful, wanton, reckless, grossly negligent, and negligent acts as set out above, Decedent suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival claim: (a) physical pain and crushing of his body; (b) suffering; (c) mental anguish; (d) emotional distress; and (e) shock and injury to Decedent's nerves and nervous system.

44. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant as set out above, as well as its violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

WHEREFORE, having stated its factual allegations and causes of action against Defendant, the Personal Representative prays for the following:

- i. A trial by jury;
- ii. Judgment against Defendant for actual, consequential and punitive damages pled herein in an amount to be determined by the jury;
- iii. For the costs of this action; and
- iv. For such other and further relief as this court deems just and proper.

Lexington, South Carolina  
June 12, 2023

**BLAND RICHTER, LLP**  
*Attorneys for the Plaintiff*

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**AFFIDAVIT OF NON-SERVICE**

State of South Carolina

County of Richland

Common Pleas Court

Case Number: 2023-CP-40-3052

Plaintiff:

**Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased,**

vs.

Defendant:

**Jays Bar and Grill, LLC**

For:

Bland Richter LLP  
105 West Main Street, Suite D  
Lexington, SC 29072

Received by Milligan & Associates LLC to be served on **JAYS BAR AND GRILL LLC c/o Jay Kalin, Jr Registered Agent, 104 High Circle 8 B, Myrtle Beach, SC 29572.**

I, Roger Turner, being duly sworn, depose and say that on the **13th day of June, 2023 at 12:15 pm, I:**

**NON-SERVED:** After due search, careful inquiry and diligent attempts I was unable to serve the **Summons and Complaint** for the reason that, **RENTAL PROEPRTY OWNED BY THE DEFENDANT - WHEREABOUTS UNK PER OCCUPANT** ,or information to allow further search.

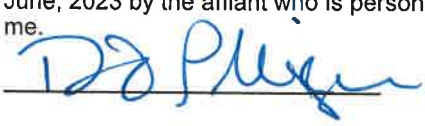
I certify that I am over the age of 18, have no interest in the above action, and in good standing, in the judicial circuit in which the process was served.



**Roger Turner**  
Process Server

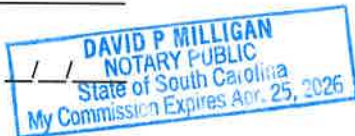
**Milligan & Associates LLC**  
Process@MilliganAndAssociates.com  
P.O. Box 4845  
Florence, SC 29502-4845  
(843) 667-4747

Subscribed and Sworn to before me on the 14th day of June, 2023 by the affiant who is personally known to me.



PRINT NAME

NOTARY PUBLIC



Our Job Serial Number: DPM-2023000360  
Ref: Kimble v. Jays Bar

ELECTRONICALLY FILED - 2023 AUG 31 10:02 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052  
ELECTRONICALLY FILED - 2024 AUG 29 7:24 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052

# STATE OF SOUTH CAROLINA

## AFFIDAVIT OF DILIGENT SEARCH

RICHLAND COUNTY

COURT OF, COMMON PLEAS

DOCKET # 2023-CP-40-3052

PORTUNDO M. KIMBLE, A PERSONAL REPRESENTATIVE OF

THE ESTATE OF DEVON ENRIQUE KIMBLE, DECEASED

-VS-

JAYS BAR AND GRILL, LLC

THE UNDERSIGNED, JEFF COSTNER, BEING DULY SWORN STATES HE ATTEMPTED SERVICE ON THE FOLLOWING DOCUMENTS : (1) SUMMONS (2) COMPLAINT (3) PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT (4) PLAINTIFF'S FIRST REQUEST FOR PRODUCTION TO DEFENDANT

IN THE FOREGOING ACTION ON : JAYS BAR AND GRILL, LLC

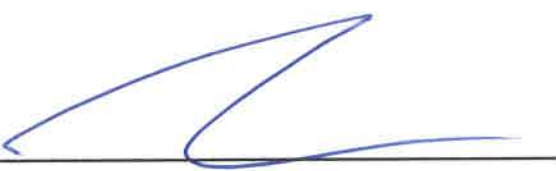
AFTER A DILIGENT SEARCH THIS PERSON CANNOT BE LOCATED AND THE PROCESS SERVER STATES HE HAS ATTEMPTED SERVICE ON THE FOLLOWING DATES, TIMES AND ADDRESSES.


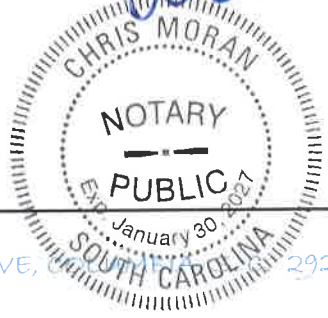
THE SERVER, JEFF COSTNER HAS MADE THE FOLLOWING ATTEMPTS TO SERVE A JAY KALIN, JR, WHO IS THE REGISTERED AGENT FOR SERVICE FOR JAYS BAR AND GRILL, LLC AT THE BUSINESS LOCATION AT, 902 GERVAIS STREET, SUITE D, COLUMBIA, SOUTH CAROLINA 29201, ON JUNE 20, 2023, AT 8:45 am, THE SERVER WAS TOLD HE WAS NOT THERE, MAY BE IN LATE THAT AFTERNOON, ATTEMPTED AGIN ON JUNE 20, 2023 AT 4:40 pm, SERVER WAS TOLD HE IS NOT THERE, AND WAS NOT COMING IN THAT DAY, ATTEMPTED ON JUNE 21, 2023 AT 5:10 pm, THE SERVER WAS TOLD HE IS NOT THERE AND HE WAS TOLD THEY DID NOT KNOW IF HE WAS COMING IN OR NOT. ATTEMPTED ON JUNE 22, 2023 AT 5:00 pm, THE SERVER WAS TOLD HE WAS NOT THERE. THE SERVER HAS NOTICES THAT THERE IS USALY A BLACK PORSCHE IN THE BACK PARKING LOT ON SEVERAL OCCASIONS, WHEN ATTEMPTED AND BELIVED TO BE THE VECHICLE THAT JAY KALIN JR DRIVES, ATTEMPTED ON JULY 05, 2023 AT 9:00 am, THE FRONT DOOR WAS OPEN AT THE RESTRUANT, THE SERVER HOLLERED SEVERAL TIMES AND WAS UNABLE TO GET ANYONE TO COME UP TO THE BAR AREA. ATTEMPTED ON JULY 06, 2023 AT 8:10 pm, A WHITE MALE AT THE FRONT GATE TOLD THE SERVER HE WAS NOT THERE, ATTEMPTED SERVICE AGAIN ON JULY 14, 2023 AT 10:00 am, THE BLACK PORSCHE WAS IN THE BACK BUT THE SERVER WAS TOLD BY A BLACK MALE HE WAS

NOT IN TODAY. ATTEMPTED ON JULY21, 2023 AT 3:30 pm, AND WAITED UNTIL 5:10 pm, A BLACK MALE CAME OUT AND TOLD THE SERVER HE WAS NOT COMING IN TODAY.

THE SERVER HAS ALSO ATTEMPTED A SECOND ADDRESS AT, 621 GADSDEN STREET, SUITE A, COLUMBIA, SOUTH CAROLINA 29201, THIS ADDRESS IS JAY'S VAPE SHOP, A WHITE MALE TOLD THE SERVER THAT HE IS USALY NOT AT THIS ADDRESS, JUST ONCE IN A WHILE. THE SERVER HAS LEFT A BUSINESS CARD WITH EMPLOYEES SEVERAL TIMES WITH NO RETURN CALLS. THE SERVER HAS SEARCHED FOR ANY OTHER ADDRESSES, SOCIAL MEDIA AND HAS NOT LOCATED ANYTHING BUT THE BUSINESS LOCATION.

  
\*\* JEFF COSTNER – PROCESS SERVER \*\*

  
SWORN BEFORE ME THIS, 23rd DAY OF, JULY 2023  
MY COMMISSION EXPIRES : 1.30.27

COSTNER'S LEGAL SERVICE, 2109 KATHLEEN DRIVE, SOUTH CAROLINA 29210

FILED ELECTRONICALLY FILED - 2024 Aug 29 7:24 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CIVIL ACTION NUMBER: 2023-CP-40-03052

Portundo M. Kimble, as Personal	)
Representative of the Estate of Devon	)
Enrique Kimble, Deceased,	)

**ORDER FOR PUBLICATION**

Plaintiff, )

vs. )

Jays Bar and Grill, LLC, )

Defendant. )

Having read and filed the Petition for Service of Publication by Bland Richter, LLP, attorney for the plaintiff, and it appearing that the Registered Agent for Defendant Jays Bar and Grill, LLC cannot, after due diligence, be located in Richland County, South Carolina nor Horry County South Carolina (address listed with Secretary of State), and it further appearing that a cause of action exists against said defendant,

NOW, THEREFORE, upon motion of Bland Richter, LLP;

IT IS ORDERED that service in this matter be made on defendant Jays Bar and Grill, LLC by publishing a copy of the Summons and Complaint in the Columbia Free Times, which this court feels to be the newspaper most likely to give notice to said defendant, with said Summons and Notice of filing of Complaint to be published once weekly for three (3) consecutive weeks.

**(SIGNATURE PAGE OF CLERK OF COURT ON FOLLOWING PAGE)**

ELECTRONICALLY FILED -- 2023 AUG 29 10:24 AM -- RICHLAND -- COMMON PLEAS -- CASE#2023CP4003052  
ELECTRONICALLY FILED - 2024 Aug 29 7:24 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052



Richland Common Pleas

**Case Caption:** Portundo M Kimble , plaintiff, et al vs Jays Bar And Grill Llc

**Case Number:** 2023CP4003052

**Type:** Order/Publication

So Ordered

s/Jeanette W. McBride by Brandy Metts

Electronically signed on 2023-08-01 08:24:21 page 2 of 2

ELECTRONICALLY FILED -- 2023 AUG 01 08:24 AM -- RICHLAND -- COMMON PLEAS -- CASE#2023CP4003052  
ELECTRONICALLY FILED - 2024 Aug 29 7:24 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4003052

ROA-0194

ELECTRONICALLY FILED - 2023 Aug 02 10:49 PM - RICHLAND COMMON PLEAS - CASE#2023CP4003052  
ELECTRONICALLY FILED - 2024 Aug 29 7:24 PM - RICHLAND COMMON PLEAS - CASE#2023CP4003052

Mary-Ellen Shirley Bland Richter, LLP  
105 WEST MAIN ST. SUITE D  
LEXINGTON SC 29072

# AFFIDAVIT OF PUBLICATION



State of South Carolina  
County of Richland

Personally appeared before me the undersigned advertising clerk of the above indicated newspaper published in the city of Columbia, county and state aforesaid, who, being duly sworn, says that the advertisement of

State of South Carolina  
County of Richland  
In the Court of Common Pleas  
For the Fifth Judicial Circuit  
Civil Action Number: 2023-CP-40-03052  
  
Portourido M. Kimble as Personal Representative of the Estate of Enrique Kimble, Deceased vs. Jays Bar and Grill, LLC  
  
TO Jay Kalin, Jr., Registered Agent for Jays Bar and Grill, LLC and Jays Bar and Grill, LLC  
  
YOU ARE HEREBY SUMMONED and required to answer the Complaint in this

action, which was filed on June 12, 2023 and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service by publication hereof, exclusive of the day of such service, and you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the complaint.  
  
Eric S. Bland, Esc.  
Bland Richter, LLP  
105 West Main Street, Suite D  
Lexington, SC 29072

(copy attached)

appeared in the issues of said newspaper on the following day(s):

- 08/09/23 Wed FT
- 08/16/23 Wed FT
- 08/23/23 Wed FT

at a cost of **\$114.00**  
Account# **370315**  
Order# **2050245**  
P.O. Number:

Subscribed and sworn to before me this 23<sup>rd</sup> day of August A.D. 2023

advertising clerk



NOTARY PUBLIC, SC  
My commission expires

**From:** [Ryan C. Holt](#)  
**To:** [Ronnie Richter](#); [Eric S. Bland](#)  
**Cc:** [TEAM](#); [Chris Kenney](#)  
**Subject:** RE: Kimble v. Jay's  
**Date:** Friday, March 15, 2024 11:29:00 AM  
**Attachments:** [Order Setting Aside Default.pdf](#)

---

Ronnie,

Thank you. Please find attached a proposed order.



Ryan C. Holt | *Member*  
Sweeny, Wingate & Barrow, P.A.  
803-227-3538

---

**From:** Ronnie Richter <[Ronnie@blandrichter.com](mailto:Ronnie@blandrichter.com)>  
**Sent:** Friday, March 15, 2024 9:01 AM  
**To:** Ryan C. Holt <[RCH@swblaw.com](mailto:RCH@swblaw.com)>; Eric S. Bland <[ericbland@blandrichter.com](mailto:ericbland@blandrichter.com)>  
**Cc:** TEAM <[TEAM@blandrichter.com](mailto:TEAM@blandrichter.com)>  
**Subject:** RE: Kimble v. Jay's

Ryan. We are inclined to open the default. Please prepare a proposed consent order for our review.  
Ronnie

---

**From:** Ryan C. Holt <[RCH@swblaw.com](mailto:RCH@swblaw.com)>  
**Sent:** Thursday, March 14, 2024 8:37 PM  
**To:** Ronnie Richter <[Ronnie@blandrichter.com](mailto:Ronnie@blandrichter.com)>; Eric S. Bland <[ericbland@blandrichter.com](mailto:ericbland@blandrichter.com)>  
**Subject:** RE: Kimble v. Jay's

Gentlemen, please let me know if this information is sufficient to voluntarily set aside the default against Jay's or if it is better for me to file a motion to set aside.

Thanks,



Ryan C. Holt | *Member*  
Sweeny, Wingate & Barrow, P.A.  
803-227-3538

---

**From:** Ryan C. Holt

**Sent:** Monday, March 11, 2024 11:35 AM

**To:** [ronnie@blandrichter.com](mailto:ronnie@blandrichter.com); Eric S. Bland <[ericbland@blandrichter.com](mailto:ericbland@blandrichter.com)>

**Subject:** Kimble v. Jay's

Ronnie,

Please see the attached ROR letter from Burlington that hopefully addresses the concerns you had related to whether Jay's might be let out of default.

Please let me know of any additional questions.

(The redactions pertain to the nature of defense counsel assignment.)



Ryan C. Holt | *Member*  
Sweeny, Wingate & Barrow, P.A.

1515 Lady St. (29201)  
PO Box 12129  
Columbia, SC 29211

T ■ 803-256-2233  
D ■ 803-227-3538  
F ■ 803-256-9177  
[Web](#) | [Bio](#) | [Email](#)

*This message may be confidential and protected by the attorney/client, attorney work product or other privileges. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by electronic mail. If the person actually receiving this electronic mail, or any other reader of such electronic mail, is not the intended recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you received this message in error, please send a reply, delete the message immediately, and do not forward this message to any other person.*

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

AFFIDAVIT OF  
JAY CHARLES KALIN, JR.

Affiant, Jay Charles Kalin, Jr., being of sound mind and body and over the age of eighteen (18), having the requisite knowledge to provide the statements enunciated more fully below, hereby avers as follows:

1. I am the sole member of Jay's Bar and Grill, LLC;
2. Jay's Bar and Grill, LLC operates Jay's Bar and Grill located at 902 Gervais St., Suite D, Columbia, South Carolina 29201;
3. I have never been served with a copy of the Complaint in Civil Action Number 2023-CP-40-03052;
4. I have never received a mailing with a copy of the Complaint enclosed;
5. I learned of this matter when my former attorney, Chris Kenney, notified me of the litigation after searching the public index in March of 2024;
6. My permanent residence is 104 High Circle, Unit 8B, Myrtle Beach, South Carolina 29572, which is a condo where my parents also reside;
7. My parents have never notified me that anyone showed up at the house and asked for me;
8. I do own a black Porsche SUV, but it is often left in the parking lot at Jay's Bar and Grill for many days or weeks at a time without being moved;
9. The fact the car is at my restaurant is no indication I am at the location; and
10. The car is left in the parking lot anytime I travel out of town or anytime I have even one alcoholic drink.

FURTHER AFFIANT SAYETH NAUGHT.

  
Jay Charles Kalin, Jr.

SWORN TO AND SUBSCRIBED BEFORE ME

This 29 day of August, 2024

  
Notary Public For South Carolina

My Commission Expires: 2/16/2033



STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTH JUDICIAL CIRCUIT  
 COUNTY OF RICHLAND ) CASE NO.: 2023-CP-40-03052

Portundo M. Kimble, as Personal )  
 Representative of the Estate of Devon )  
 Enrique Kimble, Deceased, )

Plaintiff, )

vs. )

Jays Bar and Grill, LLC )

Defendant. )

**PLAINTIFF’S MOTION FOR  
 RECONSIDERATION UNDER RULE  
 59(e)**

YOU WILL PLEASE TAKE NOTICE that Plaintiff Portundo M. Kimble, as Personal Representative of the Estate of Devon Enrique Kimble, Deceased, hereby moves before the Presiding Judge for the Fifth Judicial Circuit for reconsideration under Rule 59(e) of the South Carolina Rules of Civil Procedure of the Order of Judge Thomas W. McGee, III dated October 29, 2024 (“Order”) denying Plaintiff’s Motion for Damages. Plaintiff further makes this Motion for Reconsideration to preserve the issues set forth below for appeal in the event this motion is not granted. The various grounds for the Plaintiff’s Motion for Reconsideration are set forth below.

**Procedural History**

In the early morning hours of March 5, 2023, Devon Kimble was killed in a single car accident after having been served beyond the point of visible intoxication at Defendant Jays Bar and Grill, LLC. On June 12, 2023, this action commenced. By any objective view of what followed, the Defendant evaded service of process of the Complaint for months. On June 13, 2023, a process server attempted to serve the Defendant’s registered agent for service, Jay Kalin (“Kalin”), at the address provided to the South Carolina Secretary of State, 104 High Circle 8B, Myrtle Beach, SC 29572. Upon knocking on the door at the address, the server was told that the address was a rental property and that the whereabouts of the owner were unknown. Affidavit of

Non-Service, Ex. 2 to Petition for Service by Publication. Attempts were then made to serve Kalin the business address for Jay's Bar and Grill on multiple occasions:

- a. On June 20, 2023 at 8:45 am;
- b. On June 20, 2023, at 4:40 pm;
- c. On June 21, 2023 at 5:10 pm;
- d. On June 22, 2023, at 5:00 pm;
- e. On July 5, 2023, at 9:00 am;
- f. On July 6, at 8:10 pm;
- g. On July 14, 2023, at 10:00 pm;
- h. On July 21, 2023, at 3:30 pm.

On several occasions, Kalin's vehicle was observed at the business location, yet the server was told by Jay's employees that Kalin was not present and it was unknown when he would return. Affidavit of Diligent Search, Exhibit 1 to Petition for Service by Publication. As the Kimbles grieved the loss of their son and as they sought justice, the Defendant played games and flaunted the system.

On July 31, 2023, the Plaintiff filed a Petition for Service by Publication, which resulted in an Order for Publication on August 1, 2023. Thereafter, notice of this action was published in the Free Times on August 9, August 16 and August 23, 2023. Default was entered by the Clerk of Court on October 6, 2023, and a Motion for a Default Damages Hearing was filed on October 9, 2023. Still, the Defendant took no action.

On March 22, 2024, the Defendant filed a Motion to Set Aside Default. The Motion failed to offer any explanation for the Defendant's delay in responding to the Summons and Complaint so as to constitute "good cause," but instead focused on several alleged defects in the service

attempts, including the argument that the Order of Publication was improvident in that the Complaint failed to meet the requirement of S.C. Code 15-9-710 that a “cause of action exists against the defendant in respect to whom the service is to be made.” In the Motion to Set Aside Default, the Defendant argued that the Plaintiff failed to satisfy the element of S.C. Code 15-9-710 that a “cause of action exist” as against the Defendant because the Complaint asserted only a cause of action under S.C. Code sections 61-4-580 and 6-16-220 which do not recognize first party dram shop claims per the authority of Tobias v. Sports Club, Inc., 332 S.C. 90, 91, 504 S.E. 2d 318, 319 (1990). As set forth below, the Defendant was wrong both about its characterization of the Complaint and the holding of Tobias.

On August 20, 2024, the Honorable Daniel Coble entered his Order Denying Relief from Default, which failed to find a defect in the Order of Publication and which found that the Defendant failed to establish “good cause” for relief from default, as required by Rule 55(c), SCRCP, and Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct.App. 1989). Thereafter, the Defendant filed its Motion to Reconsider on August 29, 2024, arguing in part that good cause existed for the Defendant’s failure to have answered the Complaint because of the same alleged defect that there never should have been an Order of Publication as there was never a valid cause of action against the Defendant. On September 3, 2024, Judge Coble entered his Order Denying Defendant’s Motion for Reconsideration Pursuant to Rule 59(e) “[a]fter reviewing the applicable law and considering the arguments raised in the Motion.”

During the damages hearing on September 17, 2024, the Defendant argued once again that the Plaintiff was not entitled to relief because the Plaintiff had no valid cause of action to support an award of damages. In effect, this Court became the Court of Appeals to Judge Coble who had twice heard and denied the exact same argument.

## Argument

1. A valid cause of action exists – or at least a novel issue does.

Tobias does NOT stand for the proposition that South Carolina grants immunity at common law to tavern owners who overserve their patrons. Clearly, Tobias bars claims that are based solely on statutory dram shop violations: “We now join the majority of jurisdictions that have addressed this issue, and hold that South Carolina does not recognize a ‘first party’ cause of action against the tavern owner by an intoxicated adult **predicated on an alleged violation of S. C. Code Ann. §§ 61-5-30 and/or 61-9-410** (1990).” Tobias, at 91. Emphasis Added.

The Defendant mischaracterizes the Complaint here to be one that arises purely as a result of dram shop statutory violations. This is simply not true. The Complaint articulates a single cause of action which is described as “Negligence and Dram Shop.” In setting forth the alleged breaches of care, the Complaint identifies breaches (a) through (r). Only allegation (d) addresses alleged breaches of duty that arise under the South Carolina dram shop statutes.

In Tobias, the Court undertook an analysis of whether a dram shop statutory violation created a private cause of action in South Carolina. This is a far different analysis than that which exists under traditional common law tort principles. In determining whether a statutory violation creates a private cause of action, the main factor is legislative intent:

The legislative intent to grant or withhold a **private right of action** for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute.... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability. Dorman v. Aiken Communications, Inc., 303 S.C. 63,

67, 398 S.E.2d 687, 689 (1990) [\*\*\*7] (quoting *Whitworth v. Fast Fare Markets of South Carolina, Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)). When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party. *Citizens of Lee County v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992).

Having undertaken the statutory private cause of action review, the Tobias court held: “In overruling *Christiansen*, we join other jurisdictions that have refused to allow intoxicated persons to maintain a first party action against a tavern owner **based on alleged violations of statutes imposing criminal penalties for the sale of alcoholic beverages to an intoxicated adult.**” Tobias, at 93. Emphasis Added. The issue never reached by Tobias, and to the knowledge of this attorney never reached by any other appellate decision, is whether a cause of action exists under common law negligence principles for an over intoxicated patron against a bar when the patron injures himself or herself. Absent authority stating that such a cause of action does not exist, it does exist – and it was pleaded here. Minimally, it is a novel issue for which any summary disposition is improper.

Effectively, the Court erred here by granting what amounts to a post-default motion to dismiss under Rule 12(b)(6) by finding that the Complaint set forth no valid cause of action so as to support an award of damages. As such, we believe the following standards and admonitions related to Rule 12(b)(6) apply:

“In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiffs complaint and a 12(b)(6) motion should not be granted if ‘facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the

case. " Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). *See also* Kennedy v. Henderson, 289 S.C. 393, 346 S.E.2d 526 (1986) (where there is cause for doubt, or it is clear that the ends of justice may well be promoted by a trial on the merits, **a demurrer should be denied where novel issues are present or are involved**); Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967)." Emphasis Added.

The Court erred in transmuting the damages hearing into a motion to dismiss and in thereafter dismissing a claim that either clearly exists under South Carolina law or represents a novel issue under South Carolina law. The Plaintiff is entitled to, and respectfully prays for, a reconsideration of the Court's Order and an award of proper damages commensurate with their losses.

2. This Court was improvidently drafted in the role of the Court of Appeals.

Prior to the Defendant advancing the argument to this Court at a default damages hearing that the Plaintiff's Complaint set forth no valid cause of action, the same argument was twice made to Judge Coble, who twice denied relief. Incredibly, at the default damages hearing level, the Defendant was again permitted to advance the same argument, this time in the guise of an alleged defense to damages. It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability. Howard v. Holiday Inns Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); Schenk v. National Health Care, Inc., 322

S.C. 316, 471 S.E.2d 736 (Ct. App. 1996); State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 334 S.E.2d 528 (Ct. App. 1985). Though a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence. Howard, 271 S.C. 238, 246 S.E.2d 880; Ammons v. Hood, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986). Moreover, under Rule 55, SCRCPP, once a party defaults, the trial court may conduct such hearings or order such references as it deems necessary and proper, but the point of such hearings is to enter the default judgment.

It was improper at the default damages hearing to permit the Defendant to advance a Motion to Re-Consider the Motion to Reconsider the Order of Default that had already been ruled on by Judge Coble. Likewise, it was improper to permit the Defendant to do anything other than cross-examine the damages testimony.

### **Conclusion**

The trial court erred in denying relief to the grieving family of Devon Kimble by effectively transforming a default damages hearing into a motion to dismiss under Rule 12(b)(6), in effectively serving as a court of appeals to a fellow circuit court Judge who had twice heard the same argument advanced by the Defendant at the hearing and who had twice denied relief, by permitting the Defendant to go beyond the confines of what is permissible for a defaulted Defendant at a damages hearing, by misinterpreting Tobias to hold that a bar operator owes no common law duties to its patrons and/or in effectively dismissing the Plaintiff's case, and in doing so, in dismissing the novel issue of what duties are owed by a bar operator to its patrons. The Plaintiff is entitled to and respectfully requests that this Court reconsider its Order denying relief to the family of Devon Kimble and that an appropriate award of damages be granted to the Plaintiff.

{SIGNATURE PAGE TO FOLLOW}

Charleston, South Carolina  
October 30, 2024

**BLAND RICHTER, LLP**  
*Attorneys for Plaintiffs*

s/Ronald L. Richter, Jr.

Ronald L. Richter, Jr.

s/Scott M. Mongillo

Scott M. Mongillo

Peoples Building

18 Broad Street, Mezzanine

Charleston, South Carolina 29401

T: 843.573.9900 | F: 843.573.0200

[ronnie@blandrichter.com](mailto:ronnie@blandrichter.com)

[scott@blandrichter.com](mailto:scott@blandrichter.com)

s/Eric S. Bland

Eric S. Bland

105 West Main Street, Suite D

Lexington, South Carolina 29072

T: 803.256.9664 | F: 803.256.3056

[ericbland@blandrichter.com](mailto:ericbland@blandrichter.com)

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF RICHLAND ) THE FIFTH JUDICIAL CIRCUIT

Portundo M. Kimble, as Personal ) Civil Action No.: 2023CP4003052  
Representative of the Estate of Devon )  
Enrique Kimble, Deceased, )  
 )  
Plaintiff, )

v. )

Jays Bar and Grill, LLC, )

DEFENDANT’S RESPONSE IN  
OPPOSITION TO PLAINTIFF’S MOTION  
TO RECONSIDER

Defendant. )

This matter comes before the Court on consideration of Plaintiff’s Motion for Reconsideration under Rule 59(e), SCRPC. The motion should be denied as the Court’s Order Denying Plaintiff’s Motion for Damages (October 29, 2024) was well-founded and supported by the evidence.

**1. A valid cause of action does not exist.**

Plaintiff is simply incorrect in arguing that a valid cause of action, or a novel issue, exists. Plaintiff acknowledges that the *Tobias* Court prohibited first-party dram shop actions by adults.<sup>1</sup> *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 91, 504 S.E.2d 318, 319 (1990) (“We now join the majority of jurisdictions that have addressed this issue, and hold that South Carolina does not recognize a ‘first party’ cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of [S.C. Code Ann. §§ 61-4-580(2)] and/or [61-6-2220].”) By

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<sup>1</sup> There is no dispute that the decedent, Devon Kimble, was 21 years of age or more at the time of his death.

this acknowledgement, Plaintiff seems to also acknowledge that he cannot proceed under the dram shop statutes.

Plaintiff argues that despite the absence of a cause of action under the criminal statutes, a cause of action may lie at common law. However, no such cause of action exists at common law either. Plaintiff misses an essential line of case law that has established this principle. The Court of Appeals decision in *Tobias* (later affirmed by the Supreme Court) recognized the absence of a cause of action:

At common law, a tavern owner had no liability for serving alcohol to an intoxicated person who later injured himself or others. The rationale for this rule was that consuming, not supplying, the alcohol was the proximate cause of intoxication.

Many jurisdictions, however, have departed from this common law view. In an effort to deter drunk driving and to compensate innocent victims injured by drunk drivers, many state legislatures have enacted “dram shop acts.” These statutes impose civil liability on tavern owners under various circumstances, such as supplying alcoholic beverages to minors or to obviously intoxicated persons. In states where dram shop legislation has not been enacted, some courts have imposed liability on vendors of alcoholic beverages using principles of negligence, often basing a private cause of action on the violation of beverage control statutes. At least three jurisdictions have refused to interpret their penal statutes to create a civil cause of action, while others believe that such public policy decisions should be made by the legislature.

Still other jurisdictions, embracing the common law view, have enacted legislation which renders servers of alcohol immune from liability.

South Carolina is among those jurisdictions that have recognized a civil cause of action based upon the violation of a penal statute.

*Tobias v. Sports Club, Inc.*, 323 S.C. 345, 348–50, 474 S.E.2d 450, 451–52 (Ct. App. 1996), aff’d as modified, 332 S.C. 90, 504 S.E.2d 318 (1998).

The Court of Appeals’ restatement of dram shop jurisprudence, *supra*, is very helpful. First, there is no common law liability for Plaintiff’s case. But the Court of Appeals goes on to catalogue how jurisdictions have handled the common law prohibition. Some have passed “dram shop legislation.” South Carolina is not one of those. Others have codified the common law position of immunity. South Carolina is not one of those either. A final scenario is the

recognition of “a civil cause of action based upon the violation of a penal statute.” *Tobias*, 350, 474 S.E.2d at 452 (Ct.App.1996). This final approach is the one taken by South Carolina.

However, South Carolina has recognized an important exception to civil causes of action based upon violated penal statutes—a first party dram shop action. “Because South Carolina does not have a Dram Shop Act, our civil remedy arises out of criminal statutes.” *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 417, 697 S.E.2d 558, 563 (2010). “The civil remedy is predicated on criminal statutes.” *Id.* See also *Rhine v. Swem*, No. 2006-UP-049, 2006 WL 7285682, at \*1–\*2 (S.C. Ct. App. Jan. 20, 2006) (“[L]iability for such actions arises only by statute in South Carolina.”). That is precisely what the Supreme Court determined in *Tobias*. Yes, the penal statutes allow for dram shop causes of action. But this is the *only* avenue for dram shop recovery. Not the common law. Not standalone dram shop statutes. And this single avenue contains a significant exception—there can be no first party dram shop cause of action. The cause of action simply is unrecognized. Because of *Tobias* there is no novel issue with which to burden this Court.

Plaintiff’s argument that Tobias never reached the issue of “whether a cause of action exists under common law negligence principles for an over intoxicated patron against a bar when the patron injures himself or herself” not only contradicts the plain holding of *Tobias*, but it also ignores subsequent jurisprudence reviewing the *Tobias* decision. In *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750, the Supreme Court of South Carolina revisited *Tobias* to apply its reasoning to an analogous negligent entrustment claim. The *Lydia* court summarized *Tobias*’ limitation on dram shop actions as follows:

South Carolina first criminalized the sale of alcohol to an intoxicated person in 1874. The state had no statutorily or judicially imposed civil liability. . . .

At common law in American courts, a tavern owner could not be held civilly liable for injuries caused by an over served, intoxicated patron. With the repeal of dram shop laws in all but 18 states, the majority of states did not impose liability upon tavern owners. In the 1950s, several state supreme courts began to develop a theory of tavern owner civil liability based on violations of state criminal statutes forbidding the serving of alcohol to intoxicated patrons.

By 1987, 41 states had some form of tavern liability. South Carolina's General Assembly did not enact a dram shop law, but in 1985, the South Carolina Court of Appeals held that a bar owner's violation of the criminal statute forbidding service to intoxicated persons could support a civil suit against the bar for injuries caused by the intoxicated patron. Christiansen v. Campbell, 285 S.C. 164, 328 S.E.2d 351 (Ct.App.1985). . . .

In Tobias v. Sports Club, Inc., 332 S.C. 90, 504 S.E.2d 318 (1998), this Court expressly overruled Christiansen holding that we would not permit an intoxicated adult to bring a first party cause of action against a tavern proprietor predicated on a violation of the dram shop statutes. This Court stated, "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." Our Court noted that its decision did not preclude a third party from bringing a cause of action under the statutes.

We apply these same public policy considerations to this case. . . . The essence of this case and the Tobias case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself towards another. Just as this plaintiff cannot bring a first party cause of action to challenge the discretionary conduct of the tavern owner, he cannot bring the same action to challenge the discretionary conduct of his entrustor.

*Lydia*, 355 S.C. at 41–43, 583 S.E.2d at 753–754. As *Tobias* and *Lydia* both make clear, there is no outstanding issue in South Carolina as to whether a common law cause of action exists under common law negligence principles for an over intoxicated patron against a bar when the patron injures himself or herself. There is no precedent for such an action in common law, and South Carolina's "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." *Lydia*, 355 S.C. at 41 (quoting *Tobias*, 332 S.C. at 90). A "plaintiff cannot bring a first party cause of action to challenge the discretionary conduct of a tavern owner." *Id.* at 42–43.

**2. The motion to set aside and motion for default judgment are two different things.**

Plaintiff suggests that “[t]his Court was improvidently drafted in the role of the Court of Appeals.” Not so. The motion to set aside considered by Judge Coble and the damages hearing presided over by Judge McGee considered two different issues. Judge Coble considered simply whether there was reason to set aside a default entered because Defendant did not answer the complaint within the period required by the Rules of Civil Procedure. His findings were procedural in nature and he specifically did not rule on the question of whether Plaintiff had raised a viable cause of action.

The issue before Judge McGee was quite different. The sole question before the Court was, what damages are owed to Plaintiff by the Defendant? A full damages hearing was held. However, because a first party cause of action for dram shop liability has *no damages*, no damages were awarded. Whether certain damages for a loss are compensable is a matter for the Legislature or the courts. For example, punitive damages are recoverable against a private citizen, but not against a governmental entity. S.C. CODE ANN. 15-78-120(b). As another example, attorney’s fees are not an available damage in most cases. But they are when specifically contracted for. In a first party dram shop case, no damages are available.

For these reasons, Judge McGee, when denying the motion for damages, considered a separate issue from that considered by Judge Coble. Judge McGee’s ruling made no comment on the propriety of the default not being set aside. Indeed, Judge McGee’s ruling concerned the Plaintiff’s motion while Judge Coble’s concerned the Defendant’s motion. The two judges considered two separate and distinct issues. Judge McGee was not “improvidently drafted in the role of the Court of Appeals.”

**3. Rule 12(b)(6) is not at issue here.**

Plaintiff contends that Defendant raised “a post-default motion to dismiss under Rule 12(b)(6).” Defendant has done no such thing. In fact, the opposite occurred—the matter proceeded to a dispositive hearing, i.e. the damages hearing conducted on September 17, 2024. The damages hearing, a final hearing on the merits, was conducted with Defendant only participating on the issue of damages as limited by procedure. Defendant argued not for a dismissal, but for an award of no damages because the Plaintiff failed to prove cognizable damages recoverable under the law. The law governs this dispute and the law has provided that no damages are recoverable. No damages are available for a cause of action that does not exist.

**CONCLUSION**

For the foregoing reasons, Defendant respectfully requests that the Court deny Plaintiff’s Motion to Reconsider.

Respectfully submitted,

**SWEENY, WINGATE & BARROW, P.A.**

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November 12, 2024